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THE FUTURE OF THE ENGLISH LEGAL PROFESSION

At a time when large numbers of barristers and solicitors are returning from war service to their chosen profession it seems appropriate to try to forecast what the future (if any) of the legal profession is likely to be. I say 'if any' since there is one school of thought which professes the view that England is rushing headlong to an anarchy in which there will be no law worthy of the name and in which the legal profession will either perish or be absorbed into the civil service—the latter fate, one gathers, being regarded as rather worse than death. But although vocal expression is given to this point of view in the Inns of Court and the Law Society's Hall, most of its protagonists do not seem to take themselves very seriously and genuine advocacy of this theory seems, in the words of the Prime Minister, to be virtually limited to the lunatic fringe.

Nevertheless, there is no doubt that social conditions in England are undergoing a radical change and that the legal profession, whether it likes it or not,[1] will have to undergo radical changes also.

A. THE FUTURE LEGAL SYSTEM

Before we can attempt to visualise what these changes are likely to be, it is necessary to have a general idea of the legal system in which the profession will have to operate. I start, therefore, with the following hypotheses which will I think command fairly general acceptance as the likely line of development irrespective of the political colour of the government of the day, although of course the speed of this development will depend on the party in power from time to time:—

1. The English social system will become increasingly Socialistic in the sense that it will adopt a planned economy designed to provide social security and equality of opportunity for all.

[1] On the whole it will not like it. The legal profession is averse to change, as recent meetings of the Bar and the Law Society have made clear. But the medical profession was equally averse. . . .

2. Its main features will be:—
   (a) A gradually increasing range of social services sponsored by the State.
   (b) Nationalisation of the key industries.
   (c) High taxation of income during life and of capital at death. This will be necessary to maintain the social services and will also lead (and be designed to lead) to a gradual elimination of the higher income groups and a levelling up of capital and income among all classes.[2]
   (d) An increasing degree of bureaucratic control.

3. These developments will lead not to less law but to more. The view sometimes formerly held that Socialism entails the eradication of any legal system in the orthodox sense is sufficiently disproved by present experience in this country. We have already moved some considerable distance along the road to Socialism and the result has been a vastly increased range of legal regulations affecting the man in the street to a greater extent than ever before, so that the legal profession as a whole is larger and busier than ever. It is also disproved by the experience of the U.S.S.R. and this despite the fact that there Socialism was introduced by civil war and revolution.[3]

On the other hand the legal system is likely to differ somewhat from the present both as regards content, method of creation, and the nature of the Courts in which it is enforced.

As regards content, the emphasis will change from private law to public law—from private contract to public regulation. This tendency is already very much in evidence. It has received a new impetus from the War and from the present Labour Government, but was noticeable long before either and was manifested in a wide range of subjects.[4] As the State increases its social services and its control over fields formerly left to private enterprise, the growth of Administrative Law in the Continental sense seems inevitable and the English

[2] The rate at which this is already proceeding is shown by the fact that the number of individuals with a net income of £6,000 per annum and over has shrunk from 7,000 in 1938–9 to sixty in 1944–45. Similarly, of tax payers whose net incomes exceed £150 per annum, only two and a half per thousand have net incomes of over £2,000 as against nearly eleven per thousand in 1938–9.

[3] See Schlesinger, *Soviet Legal Theory*, which makes it clear that despite popular belief the present Soviet legal system does not differ so very fundamentally from that of capitalist States.

[4] Note, for example, the extent to which in the last fifteen years the place of private law Restrictive Covenants has been usurped by public law Town Planning Schemes.

lawyer will have to reconcile himself to something like that Droit Administratif which Dicey taught him to fear without understanding. On the other hand, if the future method of nationalisation can be deduced from the present samples,[5] it seems that this is likely to involve less startling legal changes than might have been the case if, instead of setting up special boards and corporations, the State had attempted direct control of the nationalised industries through the civil service.

As regards the method of creating law, there seems little doubt that this will depend, in any increasing range of subjects, on rules and orders rather than on judicial decisions or on direct Parliamentary enactments. This is an old topic of controversy [6] into which I have no intention of entering. For our purpose it is sufficient to note that the trained lawyer is needed just as much to interpret and advise on law flowing from S. R. & O.s as he is on law created by Act of Parliament or judicial decision.

Finally, as regards the Courts. We must clearly expect an increase in the number of special tribunals, the growth of which has already caused disquiet in certain circles.[6] The creation of *ad hoc* tribunals is becoming almost common-form in recent legislation [7] and the habit has spread from the area of industrial relations and purely administrative law to a field in which the ordinary Courts have hitherto held undisputed sway. Thus the Furnished Houses (Rent Control) Act, 1946, sets up special local tribunals to which either landlord, tenant, or local authority can apply to fix the fair rental of a furnished letting, and it seems likely that this is the first step towards the establishment of Rent Courts to deal with all rent disputes. The present position is most anomalous since we have the normal Courts dealing with ' unfurnished ' tenancies in one way under the Rent Restriction Acts and the special tribunals dealing with ' furnished ' tenancies in another way. The likely solution of special Rent Courts to deal with the whole problem will, of course, mean that freedom of contract in such cases will largely if not wholly disappear.

The extent to which these special tribunals will encroach

[5] For an interesting discussion of certain of the legal implications of nationalisation, see XLVI *Law Journal Newspaper*, pp. 297 and 311.

[6] See, for example, Hewart, *The New Despotism*, C. K. Allen, *Bureaucracy Triumphant* and *Law and Orders*, and Lord Chorley's article on the latter at 9 MOD.L.REV., p. 26.

[7] Recent examples are the Family Allowances Act, 1945, the War Damage (Valuation Appeals) Act, 1945, and the Furnished Houses (Rent Control) Act and the National Insurance (Industrial Injuries) Act of 1946.

upon the normal judicial system will no doubt depend mainly on two inter-related factors: (1) On the extent to which public opinion continues to regard impartiality based on independence and absence of any prior knowledge of the facts as preferable to a specialist's familiarity with the problem and its implications; and (2) On the extent to which the outlook of the judiciary lags behind public opinion.[8] The view expressed by Scrutton, L.J., that 'the less social knowledge displayed by the Judge the better', may sound admirable in theory but does not work in practice. As Cardozo pointed out,[9] it is utterly impossible for any Judge completely to divest himself of his subconscious social loyalties, and hitherto the subconscious loyalties of the English Judge have tended to sway him towards the preservation of the *status quo* and towards giving greater weight to the interests of the individual than towards the interests of the State. He may be right; but the fact remains that public opinion is tending in the opposite direction,[10] towards the view that the benefit of the many justifies very considerable interference with the interests and freedom of the few.[11] The extent to which the 'new law' will be entrusted to the ordinary Courts will undoubtedly depend on the extent to which the occupants of the Bench pay regard to the spirit and purpose of legislation in their interpretation of its letter and on how far they display any subconscious prejudice against social (and Socialist) experiment.

It may be objected that another and even more important reason for the setting up of special tribunals is the excessive expense and delay of litigation in the ordinary Courts. Undoubtedly this is a powerful reason at the present time, but in my view the expense and delay can and will be cured[12] not by setting up a multiplicity of special Courts but by reforming the present judicial system. For, whatever the faults of the present system, a powerful and independent judiciary is a safeguard against any form of totalitarianism —a safeguard which we can ill afford to see destroyed.

But even if there is a substantial increase in the number and range of special tribunals, it is doubtful if this will

[8] For an example of this lag, see *Sutherland* v. *Stopes*, [1925] A.C. 47.
[9] *The Nature of the Judicial Process.*
[10] And to some extent the opinion of the Bench is changing in conformity, as is illustrated by the different outlook now displayed towards Income Tax Evasion.
[11] The village of Stevenage must die that the county of London may live.
[12] See below for some methods suggested as likely.

materially diminish the work for lawyers. While it is no doubt true that strict rules of procedure and evidence will be dispensed with and that to this extent it will be easier for the layman to argue his own case, the fact remains that the average person will still prefer a lawyer to argue his case for him. And he will be right; for a lawyer has been trained to separate essentials from non-essentials and to present an argument logically, clearly and, yes, comparatively briefly. A lawyer will, therefore, have just as great an advantage over a layman in arguing before a tribunal set up, for example, under the Furnished Houses (Rent Control) Act as in a county court under the Rent Restriction Acts.[13]

But there is also a tendency towards restricting the right to legal representation before such tribunals. Thus, the Government spokesman in the debate on the National Insurance (Industrial Injuries) Bill indicated that lawyers would not be permitted to appear before the tribunals to be set up to take the place of the county court in workmen's compensation cases. As a result of representations by the Council of the Law Society and the Bar Council this was modified to the extent of permitting it in those cases where the tribunal considers it reasonable, but not as of right. This attitude I regard as indefensible. To devise a system so non-technical that no one would want to employ a lawyer would be one thing, and lawyers could not fairly complain of that; but to take away a man's right to appear by a lawyer if he wants to, is quite another. It is only understandable on the ground that a party appearing by a lawyer will be at such an advantage that the other party will be forced to do likewise. This is flattering to us, and supports the views expressed above, but the solution is not to deny the right to legal representation but to make it freely available to both sides.

To sum up therefore, I take the view that there will in the future be plenty of work for the lawyer, if only the legal profession is organised in such a way that it can take advantage of it.

[13] Perhaps more, because in the county court the learned Judge will give the layman the utmost assistance whereas a lay tribunal is likely to lose patience with him and to be exaggeratedly impressed by the lawyer's forensic skill.

B. BASIC FAULTS OF THE PRESENT ORGANISATION OF THE PROFESSION

The present organisation of the legal profession in this country has, to my mind, three basic faults. Even at the present day they constitute serious flaws; if the forecast which has been made above has any measure of accuracy they will in the future become so grave that the demand for reform will be irresistible. These faults are:—

1. The services of the legal profession are too expensive.

This, I think, is undeniable. Despite the fact that the legal profession as a whole is not overpaid (on the contrary [14]), nevertheless legal advice and assistance is a luxury that few can afford. Moreover, so far at any rate as concerns litigation, it is too often true that the deeper the purse the greater the chances of success. At the present day we cannot even claim that, in the words of the old taunt, justice is as open to all as the Grill Room at the Ritz Hotel, for the Ritz is now subject to price control whereas the sky is still the limit so far as the fees of a fashionable silk are concerned. I do not think that today anyone would seek to defend this state of affairs; the Rushcliffe Committee's Report and the profession's response to it show that the flaw is recognised and deplored.[15]

2. The period of apprenticeship is too long, the expenses of qualifying are too great, and the rewards are too long delayed.

The minimum period of training is three years in the case of a barrister and five years in the case of a solicitor. If a Laws degree is taken at a University these periods are increased. During the whole of this time the trainee earns nothing and his actual out-of-pocket expenditure on fees and premiums is likely to exceed £400.[16] And even when he has qualified he may still not be self-supporting; it will be many years before a barrister will earn enough to keep himself (let alone a wife and family), and a newly-qualified solicitor will be lucky if he obtains employment at more than £300 per annum, nor will he materially increase this for many years unless he has capital. This position is now aggravated

[14] See below para. 2.

[15] But it is not so long ago that I heard it seriously argued by a High Court Judge that this expense is an advantage since it discourages frivolous litigation. This argument is similar to that which would deny the working man a living wage lest he should spend it on drink.

[16] See note on p. 217.

by compulsory military service which adds another two years or so before the lawyer will be self-supporting in his chosen profession.

The result is that the legal profession is open only to those with fairly substantial private means—a class rapidly diminishing in numbers—and to the very occasional genius who has the brains to win and the courage to rely on scholarships and prizes to maintain him until he can maintain himself. It is difficult to believe that a State pledged to a policy of equality of opportunity will permit this to continue for long, even if the profession finds it possible to recruit itself on these terms.

3. Legal Education and Training are badly organised.

Legal education in this country is undertaken by three different types of organisation, the Universities, the Council of Legal Education (for the Bar), and the Law Schools of the Law Society and provincial Law Societies (for Solicitors).[17] Within this framework one would expect that the Universities' courses and examinations would be directed towards an academic background of the theory and general principles of the law, whereas those of the professional bodies would be essentially practical.

This, however, is by no means wholly true. In fact, the Universities alone provide a thorough legal training and the

[16] *Minimum* out-of-pocket expenses are:—

Barrister	£	s.	d.
Admission Fees	21	1	0
Stamp Duty	25	0	0
Lecture Fee	12	12	0
Examination Fees	4	14	6
Commons	13	10	0
Bar Dues	12	0	0
Call Fee	50	0	0
Stamp Duty	50	2	6
Reading in Chambers ..	105	0	0
Books and Miscellaneous (say)	30	0	0
Total	£324	0	0

Solicitor	£	s.	d.
Premium on Articles (say)	262	10	0
Stamp Duty on Articles ..	80	0	0
Law Society's School ..	52	10	0
Examination Fees	16	0	0
Admission Certificate, Fees	5	0	0
Stamp Duty	25	0	0
Practising Certificate ..	5	10	0
Books and Miscellaneous (say)	30	0	0
Total	£476	10	0

Note, that a large portion of this expense is due to stamp duties which are a unique imposition on our profession. The premium of 250 guineas for the Solicitor's Articles has been taken as a fair average.

[17] I ignore Law Coaches (though most students do not), except to say that while a few run genuinely educational establishments, the majority merely 'cram' for the professional examinations and are at the best a necessary evil while the present system remains.

courses of the professional bodies are perfunctory [18] and in many circumstances merely optional. As regards the examinations, there is much duplication. The Bar examinations and those of the Universities are virtually identical in scope and difficulty, and while the Solicitors Final is admittedly different (its questions are severely practical but it is not a practical examination but merely a test of memory—which is the last thing a lawyer should be taught to rely on), the Honours examination (which is optional [19]) is again virtually identical with the Universities Finals and the examiners are in fact the Cambridge Law School.

The result is that the Universities have fallen between two stools, since, in addition to trying to provide the general background which is their proper task, they also endeavour to teach the various subjects required for the professional examinations. Thus in their curricula one finds such incongruous bed-fellows as Roman Law and Conveyancing,[20] Jurisprudence and Evidence, the History of Law and Company Law, etc. And the student leaves with an incomplete knowledge of principles and a theoretical knowledge of practice.

As regards practical training, the position is equally unsatisfactory. The solicitor has to serve a long (too long) apprenticeship in an office before he can qualify, but a barrister can do so without any practical experience at all. Most do in fact spend a period in chambers as pupils but frequently not until after they have qualified. And only a very small number spend any time in a solicitor's office, so that they have no idea of the day-to-day problems of legal practice from which they remain sterilised throughout their careers.

C. REFORMS ALREADY IN PROGRESS

Some measure of reform of the first of these basic faults (expense to the public) has already taken place as a result of the Poor Persons Procedure, Legal Aid in Criminal Cases, the Services' Divorce Department, Services' Legal Advice Sections, and Poor Man's Lawyers. These, however, scarcely

[18] In fairness to the Law Society it should be said that they have recently introduced sweeping changes in their School and tuition will in future be by full-time teachers. For reasons given below (p. 225) this is not regarded as an unmixed blessing.

[19] Hence, to qualify as a solicitor one has to memorise a wide range of detail but need never acquire any knowledge of basic principles!

[20] If they swallow this essentially practical subject it is difficult to see why they should boggle at Divorce Law—but apparently they do.

touch the fringe of the problem, particularly as the financial limits within which the Poor Persons Procedure can operate are utterly absurd under present conditions [21] and when it is brought into operation it is deplorably dilatory. Moreover, the first three palliatives deal only with aid in litigation, and legal advice and other aid short of representation in Court are left (in the case of civilians) to Poor Man's Lawyers who do good work on a purely voluntary basis but who lack the facilities and organisation to give the assistance that is needed. They too are supposed to aid only those who qualify as 'poor persons' and generally profess merely to give advice, although many of them in fact write letters and take other action which is essential if genuine assistance is to be afforded.[22]

These reforms will be carried a considerable step further when the recommendations of the Rushcliffe Committee [23] are implemented. It is not proposed to deal with these recommendations in detail as it is assumed that the profession is familiar with them.[24] Their result will be an organised system of legal aid for the needy having the following immense advantages over the present system :—

1. Provision will be made for legal aid short of litigation.

2. The present rigid financial limits will be done away with in favour of a graduated system under which the very poor will pay nothing and those who can afford to contribute will do so according to their ability, the decision depending on a means test carried out by the Assistance Board.

3. Although the scheme remains under the control of the Law Society (responsible to the Lord Chancellor) the bulk of the cost of running it will be removed from the legal profession to the State, the solicitors and barristers concerned being remunerated to the extent of 85 per cent. of their normal charges.

These improvements are considerable but are clearly not the last word on the subject. On the contrary the scheme is

21 Income not exceeding £2 per week and capital not exceeding £50 (or double these figures in special circumstances). With the present scales of wages and cost of living this excludes all but the very poorest.

22 Certain bodies organising Poor Man's Lawyers (*e.g.*, the Bentham Committee) also provide additional assistance in a necessarily limited number of cases. The present position over the whole field is surveyed in the Rushcliffe Committee's Report (*infra*), and in more detail in Cohn & Egerton *Legal Aid for the Poor*.

23 Cmd. 6641/45.

24 They are dealt with in a learned note at 9 Mod.L.Rev., pp. 58 *et seq.*, and in Cohn & Egerton, *op. cit.*, ch. 5.

very definitely only a half measure. Its principal disadvantages are:—

1. It preserves the present distinction between legal assistance for the moneyed classes and legal aid for the poor.[25]

2. It still remains optional for solicitors and barristers to enter the scheme and many of the best-known and busiest are unlikely to do so.

3. It therefore does not wholly remove the reproach that there is 'one law for the rich and another for the poor'. In fact, the new scheme still smacks of charity and has many of the worst features of the present medical 'panel' system that the National Health Service Bill seeks to eradicate.

4. All means tests are understandably disliked (and are anachronisms under a Socialist regime). The means test suggested in this case is a highly complicated one and is to be carried out by the Assistance Board. Not only is it likely to be extremely unpopular but it is bound to add considerably to the delay and this will be particularly regrettable in cases where the aid required falls short of representation in litigation. The Report recommends that legal aid sections shall give *advice* without means tests, the solicitor concerned receiving 7s. 6d. of which the client (where possible) will provide 2s. 6d. But if he requires additional assistance in correspondence or negotiations which cannot fairly be considered as covered by the 7s. 6d., he will have to obtain a legal aid certificate and be subjected to a means test. From my own experience as a Poor Man's Lawyer I should say that such additional assistance will be required in about 30 per cent. of applications, and if the delay of obtaining a certificate has to be incurred in all these cases the scheme will break down. The probability is, of course, that the advising solicitor will in most cases ignore the rule and do what is required without further payment, but this defeats one of the main objects of the scheme—to remove the financial burden from the profession to the State.[26]

D. FURTHER SHORT-TERM REFORMS

It is, therefore, considered that further reforms are inevitable. It is understood that the present Government have this question on their agenda although problems which

[25] Although it tries to make the distinction less obvious by recommending that the term 'poor person' be dropped in favour of 'assisted person'.

[26] For further criticisms, see Cohn & Egerton, *op. cit.*, ch. 5, para. 6.

they regard as more urgent make it unlikely that the question will be reached for two or three years. When it is reached, it seems probable that for the time being they will content themselves with certain short-term improvements and leave any sweeping changes until the working of the Rushcliffe Committee's Scheme has been fully tested.

In my view the most likely reforms are:—

(1) A merger of the two branches of the profession.

Much has recently been said and written on this topic and it is not proposed to traverse the whole ground anew. But it is thought that today few will be found prepared to argue that the division can be justified on grounds of either logic or convenience. A distinction between general practitioners and specialists is inevitable in any profession, but the present division of our profession is based on no such distinction. At a certain stage in litigation the solicitor has to call in (and the client has to pay) a barrister whether or not the services of a specialist are in fact required (and in a very large percentage of cases, including nearly all divorces, they are not). The barrister has to be briefed by the solicitor in an attempt (generally vain) to acquaint the former in a few days with the detailed knowledge of the case that the solicitor has laboriously acquired over months or even years. Conferences take place between the barrister and the solicitor and the former eventually argues the case in Court with the solicitor in attendance to prompt. The result is invariably greater expense, generally increased delay, and rarely greater efficiency.

I should not have thought that the main objection (expense) required further argument had it not been recently denied by a learned contributor to the *Solicitor's Journal*,[27] on the ground, as I understand him, that even in a merged profession the lawyer arguing the case would still need to have a brief and to be attended in Court. But even if this is true, he would not have to learn his brief from scratch (as a barrister is paid to do) nor would there be the numerous conferences between barrister and solicitor for which both are paid at present. Nor, it is suggested, would the method of remuneration be based on quite the same lavish principles as are the fees of a barrister (and his clerk) at present. Finally, there would not be the arbitrary and expensive rules of etiquette regarding the approach to a leader through a

[27] 90 S.J. (1946), pp. 215 and 319.

junior and the fixed proportion (two thirds) which by convention the remuneration of the latter must bear to that of the former. But the proof of the pudding is in the eating; despite the fact that briefs in the county court are marked with the minimum and that conferences are largely dispensed with, it is more costly when a barrister is engaged than when the solicitor argues the case himself.

Apart from the primary function of arguing in Court, barristers of course also act in an advisory capacity. In so far as they are genuinely used as specialists this is unobjectionable. But in far too many cases counsel's opinion is merely taken because the solicitor wants to shelve his own responsibility or because he is too busy to go thoroughly into the matter himself; this is all very fine, but why should the unfortunate client pay?

One of the main causes of expense (and to a lesser extent of delay) could therefore be swept away by merging the two branches. Apart from this main advantage, such a step would be beneficial to the profession itself. At present nearly every solicitor is overworked; on the other hand some 80 per cent. of the Bar have little or nothing to do whereas the remaining 20 per cent. are earning inflated fees for work which they are too busy to do properly. The merger would, therefore, enable a more economical use to be made of the available trained manpower. It would also enable a more economical use to be made of the various law libraries and would remove various irritating and pointless rules of etiquette governing the relations between the two branches. Finally, it would immensely strengthen the position of the profession by enabling it to speak with a united voice.

For these reasons it is believed that a merger is the obvious method of minimising expense,[28] which will presum-

[28] This article merely deals with methods of avoiding expense by reforms in the organisation of the profession. There are, of course, many other reforms which would assist in this direction. Of these one that seems obvious and long overdue is to permit reference of hypothetical questions to the House of Lords by the Attorney-General. A recent example of the need for this is furnished by *Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154, in which the H.L. overruled a decision of the C.A. which had stood since 1942 and on the basis of which thousands of estates had been administered. The question turned solely on an ambiguity in an inefficiently drafted statute, and it is scandalous that the resolution of such an ambiguity should be dependent on the chance of its being litigated and that the individual litigant should have to bear the grave expense of resolving it. The traditional objections of the Bench to answering hypothetical questions do not carry conviction; the practice is recognised by many of the Dominions and if the Judicial Com-

ably be the main object of any reforms. It is also the reform most likely to commend itself to the majority [29] of the profession. It is thought therefore that the merger (inevitable sooner or later) may well commend itself to the present Government as an immediate and practical step. Any objection that the divided profession is an essential element of the common law system is sufficiently disproved by the U.S.A. and many of the dominions which have found no difficulty in discarding it and shown no desire to readopt it.

Admittedly, a merger cannot be effected by a stroke of the pen. As regards future entrants to the profession no difficulty need arise; the Law Society and the Bar Council would presumably be amalgamated to form a united Law Council which would control entry, those who qualified having access to the lay client and a right of audience in all Courts. But the absorption of the present members will present problems, particularly so far as the Bar [30] is concerned since barristers are unaccustomed to dealing direct with the lay client and would be initially ill-equipped were they so ill-advised as to set up in general practice on their own. These difficulties should not be serious, however, since the number of practising barristers is comparatively very small; many of them would no doubt continue to practise as specialists and consultants and the rest could well be absorbed with the larger firms of solicitors (or ' law firms ' as they will then have become).

2. A reform of legal apprenticeship and education.

It has already been suggested that the present system suffers from the basic faults that apprenticeship is too long and too costly, and that legal education is wastefully organised. A merger of the two branches will greatly facilitate reform under these heads also, and will enable a uniform system of practical training to be operated by the new Law Council and a proper division of responsibility

mittee find it possible to answer hypothetical questions it is difficult to see why the same individuals sitting as the House of Lords should find it impossible to do so.

29 But the minority (virtually limited to part of the ' fashionable ' 20 per cent. of the Bar and a few to whom tradition is more precious than public convenience) is admittedly powerful.

30 The converse case gives less difficulty since most firms of solicitors already undertake some advocacy and where they do not there will be nothing to stop them from employing another firm on an agency basis, or, if the case merits it, from engaging a specialist advocate.

to be worked out between it and the Universities. I think that the new arrangements will be somewhat on the following lines:—

(1) All trainees before their practical apprenticeship will be required to take a three-year course at a University [31] in the general principles of the law. I suggest that the following subjects [32] should be compulsory: History of English Law, Jurisprudence and the Theory of Law, the English Legal System, Constitutional Law, the General Principles of Contract, Tort, and Criminal Law and of Equity, Private and Public International Law and (for comparison) the general outline of one *living* foreign legal system (preferably one based on Roman Law, *e.g.*, Scots Law). This last subject would take the place of Roman Law which I do not consider justified as a compulsory subject. The omission of compulsory Roman Law would I hope finally kill the heresy that a knowledge of Latin is essential for a lawyer. In fact the few catch phrases that he needs to know he could learn in half-an-hour, and what is more he could learn to pronounce them as they are pronounced in legal practice; whatever justification there may have been for the Latin fetish was destroyed when the 'reformed' pronunciation was introduced.[33]

(2) At the end of this course the trainee will be articled [34] to a law firm for one year,[35] but during this year he will be paid a minimum salary of, say, £250 p. a. and will *not* pay any premium on his articles. The present system whereby the clerk pays his principal is an anachronism. Even today the clerk is a useful asset to his principal during the later years of his articles, and after acquiring the general background provided by the University course he would be well worth

[31] I assume that by this time the State's educational system will ensure that entry to a university by suitable candidates is not debarred merely on the ground of expense.

[32] There is also much to be said for the inclusion of certain non-legal subjects (*e.g.*, general sociology and philosophy).

[33] At present we have the absurdity of special courses of 'Latin for Lawyers' in which the student is taught in the reformed pronunciation solely in order to qualify him for a profession in which he will have to take care never to use that pronunciation!

And see further *R.* v. *Venables*, Herbert, *Uncommon Law*, p. 360.

[34] For convenience I have used the nomenclature at present applicable to the solicitors' branch.

[35] In view of the fact that he will be receiving a salary there is no particular objection to a longer period if one year is thought to be too short. Personally I consider it adequate provided that time off to read for examinations is not given.

£250. To obviate any difficulty in obtaining articles[36] the Law Council might have power to compel each practising lawyer to take one articled clerk at the minimum salary.

(3) During this year he will take an evening or part-time practical course at a law school run by the Law Council where the teachers will be practising lawyers.[37] This course will cover such subjects as Procedure and Practice, Conveyancing, Probate, Divorce, Evidence, and Company and Commercial Law with various optional subjects (such as Industrial Law, Local Government Law and Administrative Law) dependent on the type of practice envisaged.

(4) At the end of the year he will be required to pass a qualifying examination. At least part of this should take the form of problems of a type met with in practice on which the candidate (who would be given the run of a law library) would be required to produce a written opinion, for this (not a memory test) is the true test of practical ability.

The system envisaged will have the advantages of much reducing the length of time before the student starts to earn his living, of diminishing the expense, and of giving all lawyers an all-round training embracing a general background of theory, and tuition and experience in practice. It should also have the ancillary advantage of doing much to heal the rift between the academic and the practising sides of the profession.[38] In the U.S.A. the relationship between the two branches is much healthier and it is not uncommon for a lawyer to move direct from a Chair to the Bench or *vice versa*. In this country this is unheard of, and the practitioners' suspicion of the teaching side almost passes belief.[39] If every practitioner had had an initial academic training this suspicion might die.

E. LONG-TERM REORGANISATION

The reforms contemplated above, coupled with those recommended by the Rushcliffe Committee, will undoubtedly

[36] There would be no difficulty. He would still be the cheapest and not the least useful type of clerk.

[37] I regard this as important, and it is for this reason that I doubt whether the Law Society's recent introduction of full-time teachers at their Law School is a wise move (*ante*, p. 218).

[38] This has recently been deplored by Professor Fyzee: 'The Teaching of Law in Indian Universities': the Bombay Law College Mag., 1946.

[39] As an example: In connection with the award of a Law Society's Scholarship I had to pass the scrutiny of a sub-committee of the Law Society's Council. At this time I was teaching law at a university and the sub-com-

go some considerable way to meet the demand for a more up-to-date organisation. But it would be wishful thinking to pretend that they alone will meet the demands of the State of the future. It can hardly be doubted that a National Legal Service available to all will be regarded as an essential element of Social Security second only in importance to a National Medical Service which is now being established and to which all political parties are pledged. This is, indeed, only a logical development of the principle accepted by the Rushcliffe Committee that 'legal aid should be available in all Courts and in such a manner as will enable persons in need to have access to the professional help they require'.[40]

It should be stressed at once, however, that this does *not* mean that all lawyers will become civil servants, any more than the National Health Service means that medical practitioners will become civil servants. Of course, an increasing number of lawyers are employed by Government departments and many more will in the future be employed by the Crown or as *quasi*-civil servants by the corporations and boards established to operate the nationalised industries. But there are the strongest reasons for retaining the independence of the legal profession and the greater the powers of bureaucracy the stronger these reasons become. Happily this seems to be well appreciated by the public and by politicians. The Rushcliffe Committee reported that there was almost unanimity among witnesses that any scheme they evolved should be run by the legal profession itself and not by the State or local authorities, and it will perhaps best reassure my colleagues if I quote from the memorandum submitted by the Labour Party[41]:

> There are obvious objections to the State itself establishing and maintaining legal advice bureaux. Not the least of these objections is that the State itself is directly or indirectly affected by many of the claims upon which such bureaux would have to advise. Nor, in the opinion of the Labour Party, is it desirable that local authorities should be entrusted with the duty of establishing and maintaining legal advice bureaux. . . . Differences, political or otherwise, might well arise were a local authority to be held responsible, directly or indirectly,

mittee were openly reluctant to award the scholarship to one tainted by academic contacts. 'We are giving you this scholarship', they said, 'as a lawyer and *not* as a don; be a good solicitor Mr. Gower, be a good *solicitor*.'

[40] Cmd. 6641, p. 23.

[41] *Ibid.*, p. 24.

for the advice given on any particular matter. Moreover, it has to be borne in mind that many local authorities, particularly those concerned with passenger transport undertakings, are themselves frequently parties to litigation.

These arguments apply *a fortiori* to any National Legal Service. But they do not necessarily lead to the conclusion adopted by the Committee that the operation of the scheme should rest solely with the profession.[42] The legal profession and a legal service exist for the benefit of the public (and not *vice versa*) and there is every reason for allowing the public (as users) to have a voice in the running of the service.[43] Not the least of these reasons is that it would help to restore the waning confidence of the public in the profession if they were brought into closer contact with it and had a better idea of its working than they are able to obtain from the Press which is naturally mainly interested in its seamy side.[44]

The Rushcliffe Committee's Scheme will afford a base on which an extended National Legal Service can be built and the National Health Service Bill gives a pointer as to the general lines which such a Service is likely to take. But there are differences between Medicine and Law of which account has to be taken. The chief of these differences arises from the complications caused to a Legal Service (but not to a Health Service) by the position of corporations. An artificial person cannot be ill and never requires medical attention; on the other hand as a creature of the law it needs legal advice at its birth, at frequent intervals throughout its life and at its final dissolution. If the principle is recognised that everyone is entitled to legal aid without payment, is this to extend to corporations? Obviously this would not be practicable under present conditions; such concerns as the banks, insurance companies, I. C. I. and Lever Bros. would immediately dismiss their legal departments and have their work done at the taxpayers' expense. But it has been assumed that the present conditions will have altered radically and that many of these large institutions will have been nationalised. As regards such private corporations as remain, it may be argued that if, as seems inevitable, the State

42 See on this point the criticisms of the Report in IX *Cambridge Law Review*, p. 261.

43 As is being done in the case of the National Health Service.

44 One defaulting solicitor and a sensational divorce are news. Ten thousand honest solicitors and a reconciliation are not.

retains the closest control over their formation and activities,[45] there is no logical reason why those that are permitted to exist as being in the public interest should be denied the right to legal advice on the same terms as natural persons. The answer to this question must, however, depend on the circumstances existing at the time when a National Legal Service is introduced and it may well be that exceptions will have to be introduced in the case of corporations possibly amounting to their total exclusion from the Scheme.

Another important difference between medical and legal aid is that whereas one person only has one doctor who necessarily resides in the same neighbourhood, this need not be so in the case of client and lawyer. Many people (once again this particularly applies to corporations such as banks, insurance companies, property companies and building societies) employ several different firms of lawyers, and a man living in Northumberland may have as his lawyers a firm in London.

Bearing these factors in mind I envisage that the National Legal Service of the future will be organised on the following lines :—

1. The Service will be controlled by a Central Advisory Council responsible to the Lord Chancellor (or the Minister of Justice, if we have one by this time). This Council will not be formed exclusively of members of the legal profession but partly of lawyers and partly of representatives of outside interests (the T.U.C., commerce, transport, the Church, banking, insurance, building societies, etc). In all probability half the members will be nominated by the Law Council and the remainder by the Government.

2. The Central Council will act through Area Committees (cf. the Executive Councils of the National Health Service) similarly constituted but containing representatives of the local authorities among the non-legal members. Area Committees will already be in existence as a result of the Rushcliffe Committee's Scheme and all that will be necessary will be for them to be expanded to meet their increased responsibilities and to incorporate outside interests.

3. The Area Committees will maintain lists of lawyers practising in their areas who wish to participate in the

[45] Borrowing (Control of Guarantees) Act, 1946.

Scheme.[46] As at present lawyers will be able to practice either alone or in partnership and in the latter event the partnership will appear on the lists in the firm's name.

4. All persons[47] will be entitled to choose their own lawyers either from the list of the area in which they themselves reside or from any other area list. Such persons as wish to take advantage of the Scheme but who have not chosen a lawyer or have been refused by the lawyer of their choice, will have a lawyer allocated to them by the Area Committee from one of the lawyers on their list. Each lawyer will thus have a panel of those he has accepted as his clients and as regards these the present relationship of lawyer and client will prevail except that the lawyer's remuneration will come from public funds and not directly from the client.

5. The lawyer will be permitted to take such legal action on behalf of his client as he thinks necessary, without any outside control or, of course, any means test. I do not think that it need be feared that this will encourage frivolous resort to legal advice[48]; it is a fact, not perhaps generally recognised by lawyers themselves, that the average person regards a visit to his lawyer with about as much distaste as a visit to his dentist. No doubt we shall continue to be plagued by the old women (of both sexes) who want to alter their wills every few weeks, but these are certainly not more common than the imaginary invalids, known to every medical practitioner, whose existence was not considered as an obstacle to a National Health Service.

But this complete freedom of action on the part of the lawyer must be subject to two limitations:

(a) 'Legal' action only will be permissible, *i.e.*, such action as requires a lawyer. At present some people employ lawyers for such tasks as filling up their income tax returns; if they want this done they will obviously have to pay for it and not expect it to be undertaken at the public expense.

(b) Before actual litigation is commenced, an application will have to be made to the Area Committee which will have to be satisfied that there is a *prima facie* case. It seems

[46] As in the case of the Health Service, it is assumed that lawyers will (at any rate in the first instance) be allowed to continue in practice outside the scheme if they wish.

[47] The possible need for an exception in the case of corporations has already been considered.

[48] If the lawyer is not remunerated on the basis of work done (see below, p. 230), he will of course be in a strong position to discourage frivolous applications.

essential that this control should be exercised before parties are permitted to litigate at the public expense and that this will be necessary whether the party wishes to commence or defend an action. In effect, therefore, the procedure under the Rushcliffe Committee's Scheme will be continued except that the Committee will merely be concerned with whether there is a *prima facie* case and not with the means of the applicant. In the case of criminal proceedings legal aid certificates would no doubt continue to be granted by the Court concerned whenever it appeared desirable in the interests of justice but apart from this every defendant who had elected to take advantage of the Service would automatically be entitled to advice from his lawyer who would ensure that he was aware of his rights [49] and that an application for a certificate was made if the circumstances warranted it.

6. We now come to perhaps the most controversial point: On what basis is the lawyer to be remunerated?

There are four feasible methods:—

(a) For work done;
(b) By capitation fees;
(c) By salary; or
(d) By a combination of the above methods.

(a) The first of these possibilities has obvious attractions and is no doubt the solution which, at first glance, would find most favour with the profession itself. Solicitors are at present remunerated on this basis [50] and their charges are controlled by statute, so that this method would virtually be a continuation of the present practice. Moreover, it would leave the incentive to work undiminished and give the greatest rewards to those who did the most. But this appearance of simplicity is largely illusory. If the State is going to foot the bill, the State will obviously insist on taxing the bill—it is too much to hope that it would be prepared to pay on the lawyer's *ipse dixit* without inquiry. At present taxation, or indeed preparation of a detailed bill of costs, is the rare exception because it is to the solicitor's interests to be scrupulously fair—or even generous—to his clients. But if the State and not the client was paying, could *every* lawyer

[49] At present it is often only the old lag who knows of his rights and makes sure that he obtains them.

[50] Not entirely, because where 'scale fees' are appropriate the remuneration is proportioned to the value of the subject matter and not to the amount of work.

be trusted never to take, and charge for, an unnecessary step, and always to charge the minimum to which he is definitely entitled and never the maximum to which he thinks he may be entitled? I fear that the Legislature is unlikely to think so. And so taxation would become the inevitable rule instead of the rare exception and every lawyer's office would have a vast staff doing nothing but preparing detailed bills and taxing them before the Taxing Masters (themselves multiplied to many times their present numbers). Imagination boggles at the thought.

If, on the other hand, one of the other solutions is adopted all the dreary routine of preparing bills can be scrapped—and with it cost clerks and Taxing Masters who can instead turn their talents to more useful activities.[51]

(b) Payment by salary is the simplest of all solutions. The objection that it would destroy the independence of the legal profession and turn its members into slavish supporters of bureaucracy, I regard as nonsense. After all, Judges and stipendiaries are at present paid by salary and their independence is proverbial; if this objection were sound, impartiality and independence would only be found among the unpaid magistracy which is more than even its most extreme supporters have ever argued.

No, payment by salary of itself clearly need not destroy independence. Neither does it follow that adoption of this principle would be to the financial detriment of the profession. It has already been pointed out that the financial rewards reaped by most lawyers are inadequate and too long delayed, and if a salary scale were adopted similar to that recommended for the medical profession by the Spens' Report[52] the average practitioner would be better off and would receive a fair reward much sooner.

The real objection to payment by salary alone is that given by the Spens' Committee itself[53]:—

> We are satisfied that there is a far greater diversity of ability and effort among general practitioners than admits of remuneration by some single scale applicable to all. If the recruitment and status of the profession are to be maintained men must be able to feel that more

[51] It is appalling how many potentially useful citizens are at present employed on nothing more socially productive than working out how much lawyers shall be paid.
[52] Cmd. 6810/46.
[53] *Ibid.*, p. 8.

> than ordinary ability and effort received an adequate reward. On the other hand, a reward which would be appropriate when these exist would be extravagant when they do not. In consequence, we are clear that any satisfactory system of remuneration must involve differentiation dependent on ability and effort. Further, if the profession is to be satisfied and recruitment maintained, it is essential that the method of differentiation should command confidence. We are satisfied by the evidence put before us that no existing degree or qualification can wisely be made the basis of additional payment, largely because many of the qualities which make the best general practitioner are, in fact, unexaminable.

These considerations apply equally to the legal profession. And there is the further objection that if every lawyer received a salary irrespective of the work he did, some would find irresistible the temptation to do as little as possible.

It is therefore considered that this solution by itself is unlikely to be adopted, at any rate in the first instance. It will be remembered that it was rejected, despite considerable pressure, in the case of the National Health Service, on the ground that the medical profession was not 'ripe for it'.[54] In this respect the legal profession seems to me to be even less ripe.

(c) It seems likely, therefore, that *per capita* payments will form part of the basis of remuneration. In fact, the probability is that the same solution will be adopted as that chosen for the Health Service, namely, a combination of a fixed part salary [55] and capitation fees. The salary is the only method of ensuring adequate remuneration to newly-qualified lawyers, while capitation fees are the simplest method of rewarding ability and effort.

There are, of course, objections to the principle of capitation fees in the case of legal aid; on the face of it it is anomalous that the reward for acting for a prominent business man with many irons in the fire should be the same as that for acting for an old age pensioner who may never require any advice at all. But to some extent the same objections apply in the case of the Health Service and the answer is that what we lose on the swings we shall hope to gain on the roundabouts—a rule which already applies in the case of 'scale fees'.

[54] *Hansard*, April 30, 1946, p. 55.
[55] Varying with age or length of experience and, perhaps, locality.

It seems that adoption of this method need result in no very startling changes in legal practice. It will still be possible to work in partnership, for the advantages of so doing (in saving overheads and promoting a certain degree of specialisation) will be just as great as at present. And there is no reason why the partners should not enter into any agreement that they wish regarding the shares in which they (and their admitted clerks) are to participate in the joint capitation fees.

7. This Scheme will only apply to what may be termed 'general practitioners'. Specialists will remain outside the Service except that the general practitioner will be entitled to call them in when the circumstances warrant it and in such cases the Area Committee will have to approve his action and authorise payment of the fee from public funds. I can see no objection to a lawyer who is participating in the Scheme also practising as a specialist provided that he does not act as such for the clients of himself or his firm.

8. The Scheme which has been envisaged follows closely that to be adopted for the National Health Service and no doubt this precedent will be followed (in the light of experience of its working) in other more detailed matters. For example, it may well be that Legal Centres will be encouraged on the same lines as Health Centres. Such Legal Centres will to some extent have grown up as a result of the Rushcliffe Committee's recommendations, and an extension of them would result in a valuable saving of library facilities, office accommodation, and clerical assistance. Similarly, the sale of practices will no doubt be forbidden and the Area Committees will control the opening of new practices.

These, however, are matters of detail which it would be inappropriate to deal with in an article which purposes to do no more than forecast the likely lines of general development.

F. PROFESSIONAL REACTIONS

It was said at the beginning that the legal profession would have to change whether it liked it or not. What in fact are its reactions likely to be to the suggested programme?

In my view the merger of the two branches would have the support of a large majority of each, although, as already

admitted, the dissenting minority would comprise the most powerful elements.

The reorganisation of legal apprenticeship and education would probably meet with little opposition in principle but agreement on details might be difficult to obtain.

The proposal of a National Legal Service would undoubtedly meet with the most bitter opposition from the bulk of the profession, although it would receive support from many of the younger members who recognise its necessity even although they do not necessarily welcome it with enthusiasm.

It seems probable that any changes will have to be imposed from without instead of springing from within the profession itself. For what it is worth, I have given my opinion on what these changes will be. I do not pretend that I am necessarily right; least of all do I pretend that many of my forecasts will be popular with my colleagues: indeed, some of them are equally unpalatable to me. But on the whole I do not think that we need be daunted by this picture of the future in which our position would at least be preferable to that in a completely bureaucratised legal system—which in the last resort seems the only likely alternative.

L. C. B. Gower.

COMPANY LAW REFORM

A REVIEW OF THE REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT

COMPANY law is in effect the sum total of those legal principles which regulate the large-scale organisation of industrial and business management and finance in most branches of economic life. The more popular the use of the joint stock company in business, the larger is the claim of the law to submit the relationship between manager and investor to rules and regulations guaranteed by legal sanctions. One need not endorse the thesis of the 'managerial revolution' and can nevertheless be aware of the inexorable forces which, in the course of the last fifty years or so, have resulted in a considerable ascendancy of the managerial over the financial power in economic life. Business organisation is in a constant state of flux, and the law cannot hope to keep abreast of developments if it ascribes to its own provisions the quality of immutability. Other branches of commercial law—the law of sale of goods, the law of carriage, even the law of insurance—may content themselves with the setting up of a stable framework and leave the function of adaptation to the contractual practice of the business community itself. Company law cannot afford to do this. As soon as the privileges of corporate personality and limited liability have been made available to the business world, as soon as the handling of vast funds contributed by large and small investors has been entrusted to managers who are not subject to the law of loan and debt, the law must be on the alert to protect against abuses the investor, the outside creditor, and the public itself. Company law can never reach a stage of 'finality', it is in need of constant revision and, as was pointed out in a leading article in the *Times*, July 18, 1945, 'experience shows that these changes [in commercial and financial practice] have in the past demanded a major recasting of the law not less than about once in fifteen years'.

I

The 'major recasting' which the Cohen Committee had to undertake did not amount to a codification of company law. The Committee's terms of reference made it clear that its

duty was to consider amendments in the Companies Act, 1929. That Act is a consolidating, not a codifying statute, and, although the Committee do recommend (No. 10) the passing of a new consolidating Act, they do not suggest that the codification of company law as a whole is desirable. Even if all the recommendations of the Report were carried into effect, some of the paramount principles of company law, especially those protecting the company's share capital (*Trevor* v. *Whitworth* (1887), 12 App.Cas. 409; *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125), would remain outside the purview of statute law. On the whole, the Report touches 'company case law' only at its fringes, *e.g.*, in connection with the certification of transfers (No. 139) and with the financing of transactions in the company's own shares (No. 170). There is, however, embodied in the Report one recommendation designed to change a basic principle which has emanated from the Courts and not from Parliament. The *ultra vires* rule, which has long outlived whatever usefulness it may have had in the past, is to disappear in the limbo of legal history. *Ashbury Railway Carriage Co.* v. *Riche* (1875), L.R. 7 H.L. 671, is to die an unlamented death, and will drag down into the abyss a whole volume of casuistry. 'A stroke of the pen of the legislator and libraries become wastepaper.' Practitioners, students, and, if it is permitted to say so, teachers of the law will join in a chorus of praise for the recommendation (No. 12) that 'every company, whether incorporated before or after the passing of the new Companies Act, should, notwithstanding anything omitted from its memorandum of association, have as regards third parties the same powers as an individual'. The objects clause in the memorandum is to operate, like the articles of association, 'as a contract between the company and its shareholders as to the powers exercisable by its directors'. In other words: the distinction between acts *ultra vires* the company and acts outside the directors' authority will cease to exist, the objects clause will be subject to the rule in *Royal British Bank* v. *Turquand* (1857), 6 E. & B. 327, what was a matter of capacity will be a matter of agency. The objects clause will be alterable—like the articles—by special resolution, without the sanction of the Court.

One is tempted to ask why the Committee did not go one step further along the road of reform so as to suggest the abolition of the dichotomy of memorandum and articles.

They recommend (No. 29) that the memorandum is no longer to be included in the prospectus. There is no reason why in future the whole of a company's constitution should not be embodied in one document instead of two. It would have to be provided that certain provisions are compulsory (name, nationality, objects, capital, liability), that one of them (nationality) is unalterable, and others (name, capital, liability) can only be altered in certain forms and with certain consents of outside agencies. It is believed that the number of companies who have simply adopted Table A has always been small—private companies have, of course, never been able to do so—and no substantial additional burden would be imposed upon the original subscribers by this considerable and, it is submitted, useful simplification.

It was not within the Committee's terms of reference to discuss Industrial and Provident Societies, Statutory Companies, and whatever other business undertakings with corporate entity there may be. The Committee's criticism of the *ultra vires* rule applies to all of them—in the case of trade unions it was removed by the Trade Union Act, 1913—and it is worthy of consideration whether the clause in the new Bill should not be framed in terms sufficiently wide to cover them all. Some of the most useless and intractable disputes about *ultra vires* have in the past arisen in connection with railway companies. An extension of the inaugurated reform to corporate entities other than registered companies would not preclude a member from raising the question of an excess of authority in a Court of law (see, *e.g.*, *Cahill* v. *London Co-operative Society, Ltd.*, [1937] Ch. 265), but it would safeguard third parties.

The application of the principle to public corporations raises a separate issue. A comparison of section 3 of the London Passenger Transport Act, 1933, with section 1 of the Coal Industry Nationalisation Act, 1946, shows that no uniform pattern of legislation has so far been established: The powers of the London Passenger Transport Board are circumscribed in a manner similar to that used in the memoranda of registered companies, while a much wider discretion is vested in the National Coal Board. There is no reason why, even in the case of corporations of this kind, the validity of contracts with third parties should in any way be affected by the question whether the corporation has exceeded its powers, especially in view of the legal difficulties raised by

the divergencies between the margin of discretion left to the various bodies. It would, on the other hand, be hardly expedient to apply to public corporations the formula suggested by the Cohen Committee. In their case it is necessary to preserve the right of third parties to restrain an *excès de pouvoir* by means of the proper remedies, such as mandamus and injunction, available against the corporate entity itself. But the extent of its powers should not be tested within the framework of an action on a contract made by the corporation. Hence while the issue should cease to be one of 'capacity', it cannot be reduced to one merely affecting the authority of the executive organs. What can be left to an adjustment of interests between the corporation and its members where we are confronted with a corporate entity having members in the proper sense, becomes an issue of administrative law where the corporate entity device is used for the incorporation of a public interest. In this case the public duty of the corporation as such to keep *intra vires* should remain intact, but it should be a *lex minus quam perfecta* so as to protect innocent outsiders.

II

The Committee did not embark upon an investigation of the corporate entity principle as such and of its implications. *Salomon* v. *Salomon & Co., Ltd.*, [1897] A.C. 22, has, alas, survived many Companies Acts, and one is becoming resigned to its immortality. Section 275 of the present Act, which provides for the liability of directors, etc., in cases of proved fraud, is to be strengthened (No. 149), but proof of fraudulent intent would still remain the precondition for 'lifting the veil' under this provision.

Nevertheless, the Committee have, in some respects, boldly ignored the fiction of corporate personality. In a large number of instances a holding company and all its subsidiaries and sub-subsidiaries are in future to be treated as one unit and as if the subsidiaries were nothing but branches of the holding company. For this purpose the Committee have suggested a re-definition of a subsidiary company and the repeal of the present inadequate definition in section 127 of the Companies Act, 1929, (No. 118). The present definition suffers from two serious defects: it does not include sub-subsidiaries and it places too much emphasis on the ownership of shares in the subsidiary on the part of the parent company.

As the Report points out, the definition is too narrow and at the same time too wide. It is too wide because company A may hold the majority of the shares of company B without exercising any control over its management and business policy, *e.g.*, if the B shares held by A are preference capital without any voting rights or rights in the residue of profits. It is too narrow because there are many ways in which one company may control another without owning a single share. In future the control test is to be pushed into the foreground. The *Daimler* heresy of yesterday has become the orthodoxy of today. 'Control' is easy to describe and difficult to define, but defined it must be, and the law must get hold of a tangible criterion to which the question can be reduced. The Cohen Committee have taken the view that the 'power to appoint or remove or procure the appointment or removal of a majority of the directors' should be the test of 'control'. Whether or not this test will fulfil the purpose for which it has been formulated will depend on the interpretation of the term 'director' in the light of what is now section 380. According to this provision 'director' includes any person occupying the position of director by whatever name called. Will the Courts be prepared to hold that a person who has not been elected by the shareholders of the alleged subsidiary, but nevertheless controls its policy (while the so-called 'directors' are his tools), is a 'director' within the meaning of the definition? Or might it not be better, in order to give effect to the Committee's intentions, to re-cast the definition of a 'director' in section 380 and to say that 'director' includes any person who effectively determines the management or business policy of the company?

The Committee did not, however, see fit to apply the control test pure and simple. Power to appoint and remove directors does not, in the Committee's view, make a company a holding company, unless it is coupled with the direct or indirect beneficial ownership of at least one share in the alleged subsidiary or is exercisable through such ownership or through the ownership of shares in another company (this covers the case of the sub-subsidiary). It would appear that this additional criterion might frustrate the objects of the definition. Control over a company may be exercised through debentures or—see, *e.g.*, *Inland Revenue Commissioners* v. *Tring Investments, Ltd.*, [1939] 1 All E.R. 148—through an unqualified option to acquire shares. The ingenuity of

business men and their advisers will be put to the task of inventing other means of control. It is submitted that the additional criterion of beneficial ownership should be dropped.

On the other hand, it is surely right that a company should be regarded as a subsidiary (even in the absence of 'control') if more than half of its 'equity share capital' is beneficially vested in the holding company. This, the Committee suggests, should be a conclusive test of dependency. 'Equity share capital'—a new legal term—is not, of course, identical with 'ordinary share capital'. (Ordinary shares may be, and often are, limited as far as dividend rights are concerned, especially where there are founders' shares.) A share is an 'equity share' if it confers a 'right' to the whole or part of the residue of profits or (the 'or' is important!) of the proceeds of the assets in the event of liquidation.

Some space has been devoted to the analysis of this definition because the recommendations on holding and subsidiary companies are by far the most fundamental innovations suggested by the Report. This may well be the starting point of a new branch of the law, the law of 'interlinked concerns', the discipline which, in Germany, used to be known as *Konzernrecht*. So far this branch of the law has, in this country, only grown in the special field of revenue legislation. The Report proposes to attach most far-reaching consequences to the existence of company interdependence. In many cases it will be the real business unit of interlinked companies, and not the arbitrary legal unit of the single company which will be subjected to legal duties and liabilities.

Much the most important of these cases is the treatment of the business group as one entity for the purpose of formulating a balance sheet and profit and loss account. The Committee propose that a holding company and all its subsidiaries should, wherever practicable, publish a 'consolidated' balance sheet and profit and loss account (No. 119). These consolidated accounts would show the financial status of the group as a whole and ignore intra-group indebtedness and shareholdings (which are, in reality, not legal relationships at all, but accounting devices). Banks, discounting companies, and insurance companies would be exempted, and there are many other complex details into which we cannot enter. If the proposal is adopted, it may well have the desirable result of discouraging the growth of subsidiary legal entities without business reality.

III

The Committee refrained from expressing any view on the desirability or otherwise of the super-abundance of private companies. If they regarded it as an evil, they certainly did not think that they were able to suggest a remedy for it. They were faced with a 'demand that all private companies should be required to file their accounts' (No. 50) and thus, by repealing seven words in what is now section 110 (3) of the Companies Act, to deprive private companies of 'the most highly prized' of their privileges. Indeed, had the Committee acceded to this request, they might, without suppressing the private company, have given new life to the partnership as a legal institution and removed many of the worst abuses in business life. They were, however, anxious to protect the small family concern (No. 51) run in the form of a company, without examining the question whether it is desirable that small family concerns should be conducted behind the shield of limited liability. On the other hand, they desired to take away the privilege of secrecy of accounts from private companies other than the small family business, and in order to achieve this aim they subdivided private companies into two categories: 'exempt private companies' and 'non-exempt private companies' (No. 53). Broadly speaking, an 'exempt private company' would be a company none of whose shareholders is a body corporate (exceptions, *e.g.*, a trustee under a family settlement, apart) and all of whose shares 'are beneficially owned by the persons in whose names they are registered', and only such a company would retain the privilege of not filing their balance sheet and profit and loss account with the annual return. They themselves considered this criterion only as a lesser evil and recognised that 'some companies which cannot be described as small' would remain exempt under this definition.

This is one of the least satisfactory features of the Report. Is there a case for the retention of the secrecy of the accounts in the case of the family company and thus for the continuance of the widespread use of the private company? Why should a family concern which is in competition with partnerships and single traders and, for that reason, afraid of giving publicity to its accounts, not be compelled to choose between the privileges of secrecy and limited liability? The Committee themselves are in favour of publicity of

accounts and are not afraid that it may lead to small concerns being driven out of business by their larger rivals (No. 51). Their terms of reference precluded them from making a recommendation for the publicity of accounts of traders other than companies, and what they said, in effect, was: If we cannot have publicity of accounts for all traders, we must not recommend it for private companies either. To the present writer this is not a convincing argument.

But, if one conceded that the Committee have made out their case for the retention of secrecy, one may still wonder why the 'non-exempt' private company should be allowed to continue to exist as such.

Some of the minor privileges of private companies (*e.g.*, the right to have a director's partner as an auditor (No. 110), the exemption from the duty to furnish shareholders with balance sheets without request and free of charge (No. 54)) should, in the Committee's view, be removed, their exemption from the duty to appoint directory would be converted into the right of having one instead of—as in the case of the public company—two (No. 174). On the other hand, the private company would remain outside the scope of the provisions with regard to prospectuses and statements in lieu of prospectus, trading certificates, commencement of business, statutory meeting, statutory report, etc., and new privileges with regard to the election of directors (No. 130) and their retiring age (No. 131) would be conferred upon them.

There is no reason why non-exempt private companies should have these privileges, not even from the Committee's own point of view. In other words: it would be in accordance with the Committee's own intentions and in the interest of simplification and elegance of draftmanship to scrap the dichotomy of 'exempt' and 'non-exempt' private companies, and to re-define a private company by embodying the definition of an 'exempt company' in that of a private company in what is now section 26 of the Companies Act.

IV

The formation of a company is affected by the Cohen Recommendations only in one detail: the Registrar is to be empowered to refuse the registration of a company if the name chosen by the promoters is calculated to mislead, and the exercise of this power is to be subject to an appeal to the

Board of Trade (No. 16). Hitherto, under section 17 of the Act, the Registrar has been tied by a very narrow definition of what is 'misleading', and aggrieved parties have been compelled to bring a passing-off action in the Courts. In this case, few will quarrel with what amounts to a transfer of jurisdiction from the judiciary to the executive.

Far more important are the recommendations for the reform of the 'floating' procedure which follows the formation of the company, except in the case of private companies. The Committee have made a number of very significant proposals for the strengthening of the present law governing prospectuses.

One of these recommendations will have to be carefully noted by those interested in the development of the law of contract. Textbooks on this subject will, if the Cohen Recommendations are adopted, add a footnote to the statement that, in English law, a contractual offer is revocable until it is accepted. This will no longer apply to the contract of allotment. The Committee Report informs its readers that the 'stag' has his habitat not only in the wilds of Exmoor and the Scottish Highlands, but in the very heart of the City of London. There he has the unpleasant habit of subscribing to new issues of shares as a 'try-out', and then, often, of withdrawing his application before allotment with the result that frequently what first appeared as an over-subscription afterwards turns out to be the opposite. In order to hunt the 'stag' and bring him to book, the law must rid itself of doctrinal fetters, however venerable they may be. The Committee propose (No. 20) that applications for shares and debentures pursuant to a prospectus should be irrevocable for three days after the opening of the lists.

Another proposal on prospectuses (No. 28) establishes a link between the rigid machinery for the enforcement of statutory standards and the more flexible apparatus of the Stock Exchange Committee's 'permission to deal'. One of the general characteristics of the Cohen Report is the attempt to arrive at an allocation of functions between these two agencies (see *e.g.*, No. 39, No. 175): the Courts which enforce the provisions of the statute with the help of civil and criminal sanctions, and the Stock Exchange Committee which enforces additional standards by granting or refusing the permission to deal in a particular issue in the Stock Exchange. It is brought home to the readers of the Report that a study

of company 'law' without taking account of the Stock Exchange regulations is a futile undertaking, and that company law, like so many other legal disciplines, makes nonsense of the jurisprudential definition of law as something that can be enforced in a Court. The link between the two interlocking systems of standards is constituted by the following recommendations on prospectuses: if a company states in a prospectus that permission to deal has been, or will be, applied for, it is to make the application within two days after having issued the prospectus. If it fails to do so or if its application is refused within twenty-one days after the lists have been closed, the contracts of allotment are cancelled *ipso iure*, and all moneys received from the applicants must be repaid (they had to be kept in a separate account) by the company with a superadded personal liability of the directors. The filing of a statutory declaration that permission has been granted or applied for and has not been refused within those twenty-one days, is to be an additional condition precedent for the commencement of business.

Of the numerous recommendations which deal with the compulsory content of a prospectus the most notable is perhaps the suggestion to make a reality out of the disclosure of 'material contracts' by requiring their delivery to the Registrar (No. 31). But of even greater significance is the strengthening of the sanctions (both criminal and civil) for the enforcement of truthfulness and completeness of company prospectuses. The proposal (No. 36) to extend the civil liability for untrue statements to omissions of material information inaugurates the filling of a gap in the present Act which must have been obvious to every student of company law. It is arguable that the formulation suggested by the Committee is capable of improvement. It should be made clearer than the Committee have made it that every omission to state any of the matters set out in what is now the Fourth Schedule (in its improved form) is an omission of a 'material particular'.

From a practical point of view the shifting of the burden of proof with regard to *mens rea* in criminal proceedings for issuing false prospectuses (No. 41) and, with regard to experts' reports, in civil proceedings (No. 43), and the extension of civil liability to the experts themselves (No. 44) will be generally welcomed. The tenderness of the Committee to bankers, brokers, solicitors and accountants who allow

their names to appear in the document will not be generally understood, and the reasoning—or lack of it—in the paragraph (No. 46) of the Report which refuses to make them liable will hardly command universal approval.

V

The Committee do not seem to have cherished the illusion that, at this time of the day, anything like an effective control of the shareholders over the management of a big company can be re-established. The divorce between financial interest and power of management is a fact. It is a phenomenon observable all over Europe and in the United States, and it is useless for an Act of Parliament to stem the tide of an economic development which is inherent in the technical and organisational evolution of capitalist society. It is, therefore, satisfactory to see that the Cohen Committee does not purport to do more than to check some abuses so as to make shareholders' meetings and the election of directors a little more of a reality, and to make it a little easier for dissentient shareholders to organise an opposition. The period of notice for meetings is to be lengthened to twenty-one days in the case of the annual meeting and fourteen days in the case of other meetings (except, of course, if a special resolution is to be submitted, in which case it must always be twenty-one days) (No. 126), directors—except permanent directors of private companies—are always to be removable (subject to contractual compensation) by ordinary resolution, notwithstanding anything to the contrary in the articles, each new election is to be the subject of a separate resolution, unless the meeting decides without dissent for a global election (No. 130), and there is to be a retiring age for directors of public companies which, in the absence of a provision in the articles, is to be fixed at seventy (No. 131). Moreover, an attempt has been made to render it more difficult for the management to dominate the meeting through proxies, *e.g.*, by recommending that a member should always be entitled to appoint a non-member as his proxy, that members should be notified to this effect (No. 133), that proxies may speak as well as vote (No. 133), that proxy forms must be issued to *all* members or to none (see *Wilson* v. *L. M. S. Ry.*, [1940] Ch. 393) (No. 132), etc. Shareholders are to be given more generous facilities in organising an opposition by using the company's machinery for the circulation of draft

resolutions and statements before a meeting (No. 128), and they should always have the right to demand a poll (No. 136).

No one is likely to believe that these measures—beneficial though they may be—can be more than palliatives. As far as the organisation of the company is concerned, the path of reform lies in a different direction. Control over the management cannot be exercised by shareholders through the mechanism of a 'shareholders' democracy', and analogies taken from the constitutional law of a Parliamentary Democracy are singularly inept. The reality of control can only be found in the action of public opinion and in the organised supervision exercised by Government agencies. Hence the vital importance of those parts of the Report which deal with investigations by the Board of Trade and with the disclosure of the company's accounts.

The Committee have severely and convincingly criticised the existing provisions with regard to investigations by the Board of Trade (sections 135 and 136 of the present Act). They are, indeed, hopelessly inadequate, and, as the figures given in the Report show (No. 154), they have very largely remained a dead letter. The Committee take the view (No. 155) that the present law suffers from three main defects: It makes it too difficult—in many cases virtually impossible—to apply to the Board for an investigation (at least one-tenth of the share capital must be represented by the applicants in the case of an ordinary non-banking company), it imposes upon the applicants the burden of proving that they are not prompted by 'malicious motives', and it fails to empower the inspector to extend his investigation to subsidiaries. To remedy the first of these defects the Report proposes that 200 shareholders or shareholders representing one-tenth of the capital should have the right to apply for an investigation, and that the Board of Trade should have powers to act of its own motion if there is reasonable ground for suspecting fraud, misfeasance, breach of duty in the management, oppression of a minority, withholding of information, etc., and if the appointment of an inspector is in the public interest. It is also proposed that the burden of disproving malice should be abolished, and—this is perhaps the most important point—the hand of the inspector should be strengthened not only by enabling him to extend his investigation to subsidiaries and holding companies but also by empowering him to apply to the Court for an examination

on oath of anyone capable of giving relevant information (No. 156). Finally, the report of the inspector should be made available to all shareholders, and, if necessary, creditors, and the Board of Trade should be able to apply to the Court for a winding up and to bring proceedings in the name of the company for the recovery of money from persons involved in acts prejudicial to the company (No. 157). It is, indeed, a considerable step in the right direction that a company's affairs should be liable to investigation by a public body in the public interest of its own motion, and the Committee's recommendations must be welcomed by all those who believe that nothing short of administrative action can ultimately enforce compliance with the required standards.

It is curious to see how slowly the law adapts itself to the requirements of good accounting practice. The present law fails to impose any minimum standards with regard to the profit and loss account, but the Committee have made detailed recommendations to this effect (No. 103). A lawyer is hardly qualified to discuss the suggested definition of fixed and current assets (No. 99) and the provisions for the method of valuing the former (No. 100). From his point of view the most interesting proposal is that aiming at the dislosure of hidden reserves (No. 101). So far it has been the law that a company might always represent itself to its shareholders and to the public as poorer than it actually was—calculated modesty was allowed to prevail over truth. But there are weighty reasons why the law should cease to tolerate this practice. Not the least important reason is that consumers and workers are entitled to know the facts underlying the calculation of prices and wages. It remains to be seen whether the detailed recommendations made by the Committee will be sufficient to enable the law to force upon public companies a disclosure of the true value of their assets.

In connection with accounts it may also be noted that share premiums are, in future, to be treated as capital and that, except for the payment of bonus shares, the share premium account is not to be reduced without the sanction of the Court (No. 108).

It is proposed that only members of societies designated by the Board of Trade or individuals so designated should be able to act as company auditors (No. 110). While few will quarrel with the substance of this recommendation, the question may be asked whether it is not going to give to the

professional organisations of the accountants a formidable and potentially dangerous power over the livelihood of their members. Some public supervision of the exercise of their disciplinary right of expulsion may be required.

VI

There remains one—the most important—set of recommendations with reference to the relationship between management, shareholders and the public—those which concern the rights and duties of the directors themselves. The Cohen proposals are an improvement of the present law, but they do not go far enough, and it is here that the disinclination of the Committee to prescribe radical cures for obvious evils is most noticeable.

The problem of legal policy which the Committee set out to solve is one which arises wherever a person is exposed to a conflict between interest and duty. The decline in the powers of the shareholders' meeting has emphasised the magnitude of this problem in the case of the directors. The board of directors controls the company. English law has never known the institution of a permanent supervisory body charged with the function of checking the activities of the directors, nor does the experience made abroad with such supervisory bodies suggest that their introduction into the English system of company law would be desirable. Their tendency has usually been either themselves to assume the function of a directing body and to reduce the nominal directors to mere executive employees, or else to remain largely ineffective. It is probably true to say that, according to the original idea underlying English company legislation, the board of directors was not intended to be a managing body, but a body controlling the managers. As everybody knows, the boards are today usually composed of managing and non-managing directors, and the 'tendency to include in boards of directors men who hold managerial positions in the company' has, as the Committee point out (No. 89), been growing and is 'in itself by no means to be regretted'. However, this tendency aggravates the problem: *Quis custodiet ipsos custodes?*

The answer which English law has given to this question is well known: the remedy for the evils arising from a conflict between interest and duty is disclosure. The application of the equitable principles governing fiduciary relationships to

the liability of promoters has been one of the outstanding contributions of the Courts to the development of English company law (*Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App.Cas. 1218; *Gluckstein* v. *Barnes*, [1900] A.C. 240). In the case of directors the rule, usually known as the rule in *Parker* v. *McKenna*, 10 Ch.App. 96, prohibits contracts between a director and the company, unless (as is usually done) they are permitted by the articles or approved by the shareholders. Even if permitted, such contracts and indeed any interest a director may have in a contract with the company must be disclosed by him, disclosed, however, not to the shareholders' meeting, but to his fellow directors (section 149 of the Act). A general declaration that he is a member of a company or firm interested in contracts with the company is sufficient (section 149 (3)). Where the provision of Table A, Article 72 is adopted, the director must not vote on contracts with a corporation of which he is a member.

It appears, then, that disclosure to the board of directors is deemed sufficient by the present law, no doubt because the law shares the view of the Cohen Committee that the presence on the board of independent directors will be a sufficient safeguard. The shareholders' meeting itself is out of the picture altogether, except that loans to directors granted by the company or under a guarantee or on a security provided by the company must be disclosed to the shareholders (section 128 (1) (*a*) and (*b*) of the Act).

By far the most important case of a potential conflict between interest and duty is the fixing of directors' fees and of managing directors' salaries, of pensions, and of 'compensation for loss of office'. It is here that the deficiencies of the present law are most glaring. The provisions of the Companies Act about the disclosure of directors' fees and salaries are difficult to reconcile with the spirit of the English legal tradition. The shareholders are entitled to know the total of the amount paid to the directors as remuneration for their services (section 128 (1) (2), and see section 128 (5)), but this does not apply in relation to a managing director. The aggregate amount of managing directors' salaries is secret, only the fees they receive must be included in the global announcement made to the shareholders (section 128 (3)). It is true that shareholders controlling twenty-five per cent. of the votes can demand a global disclosure of directors' (including

managing directors') remuneration, but this demand can be overruled by a simple majority of the shareholders (section 148). All this applies to pensions and also to compensation for loss of office.

The Cohen Committee have been aware of the urgent need for a reform of this branch of company law. They have made one radical suggestion which will, we hope, meet with general approval: 'It should be made illegal for any loan to be made by a company or by any of its subsidiary companies or by any other person under guarantee from or on security provided by the company or by any of its subsidiary companies to any director of the company' (No. 94). This provision would not, of course, apply to loans made by banks and similar institutions in the ordinary course of business.

On the making and the disclosure of other contracts in which a director is interested the Committee have not seen fit to recommend a major reform. They do not propose that the director should be made legally liable to inform the shareholders of a conflict of interest and duty, they only suggest, as a rule of moral conduct, that 'contracts of any magnitude in which any of the board have a substantial interest' should be disclosed in the directors' report. Beyond this, they confine themselves to the recommendation that a general declaration of interest under section 149 (3) should be included in the directors' minutes. They do not even propose to prohibit the voting of interested directors at board meetings. While no doubt, as the Committee say, a general prohibition would have been impracticable, the abstemiousness of the Committee in trying to suggest a *via media* must be deplored (No. 95).

Only in one respect does the Committee recommend a full disclosure: directors should, they suggest, declare in writing any direct or indirect interest they may have in the shares or debentures of the company or any of its subsidiaries. These interests should be recorded in a separate book open to inspection by the shareholders for fourteen days before the annual meeting (No. 87). The idea is to allow the public to know whether or not they are dealing with people in possession of inside information.

All these problems are, however, overshadowed by the crucial issue of directors' fees, salaries, pensions and compensation for loss of office. The Committee recommend that full disclosure should be made 'of the aggregate of directors' fees, and, separately, of the aggregate of their other remuneration',

which should include not only salaries but also expense allowances assessed as taxable income (No. 90). Similarly, they propose a global disclosure of pensions (No. 93) and of compensation for loss of office (No. 92 (a)). Moreover, they recommend that the payment to directors of fees or salaries tax free should be prohibited (No. 88) and that compensation for loss of office of a director, other than a managing director, should always be subject to the approval of the meeting (No. 92 (a)).

These proposals are, it is submitted, inadequate. The Committee have rejected the suggestion to extend the duty to disclose to the salaries of executives other than directors. They have also refused—and this is perhaps the most serious shortcoming of the whole Cohen Report—to recommend that 'the remuneration payable to each director should be shown separately'. 'Apart from any objections which might be felt by the individuals concerned, we do not think that the shareholders would be in a position to estimate the value of the services of an individual director without detailed information as to the duties he performs, whereas by comparison of the total with the results of the company they can form a rough estimate as to whether they are getting proper value out of the services as a whole' (No. 90).

It should be noted that the Committee did not *expressis verbis* adopt the view of one of their members that 'an individual is entitled not to make public the amount of his income, a principle which is in consonance with the traditions of this country', but they did not dissent from this view with the vigour one might have desired, and, in effect, they suggested a policy inspired by this *dictum*. At the beginning of the Report (No. 1) the Committee disclaim any intention of dealing with matters of 'economic policy'. It is at the point now under discussion more than anywhere else that the unreal separation of 'legal' and 'economic' policies breaks down. In recommending the continuance of the secrecy of directors' and leading executives' salaries the Committee have pledged themselves to an 'economic policy' no less than if they had made the opposite recommendation. The vast majority of fixed salaries and wages are a matter of public knowledge. This is true of the remuneration of all public servants from the Prime Minister and the Lord Chancellor down to the police constable and the postman, and of the incomes of all those wage earners whose earnings are fixed by the processes of collective bargaining. Incomes

derived from profits, investments, commissions, professional fees, etc. are usually kept secret in view of the exigencies of a system of competitive enterprise. Secrecy of income is the corollary of the taking of risks. It is, within the framework of a society such as our own, justified by its dependence on the fluctuations of a market. The privilege of secrecy of fixed salaries paid for services rendered is the preserve of a small minority of the more highly-placed business executives. One cannot have it both ways: either these salaries are what they purport to be, rewards for work done, in which case there is no justification for keeping them secret, or they are a concealed method of sharing the profits without bearing the losses, in which case they should not be paid. These remunerations are drawn whether business is good or bad, their amount bears no relation to a risk incurred, they are only justifiable by the quality of the work for which they are paid. Business executives are not 'self-employed'. Like civil servants, workmen, schoolteachers and others they are morally liable to satisfy their employers and the public that they deserve their pay. The money which flows into the pockets of the company director or executive is 'shareholders' money'. The shareholders are entitled to obtain the material facts which enable them to compare performance with reward, not of the board of directors or of the managers as a whole, but of each individual. Against a fundamental public policy of this kind 'objections which might be felt by the individuals concerned' are of little weight, and the shareholders themselves can be left to judge whether the information disclosed to them enables them to draw their conclusions.

The Cohen Committee have shown themselves anxious to secure to the public improved opportunities for the inspection of 'material contracts' (No. 31) and for obtaining information on the price of property purchased or acquired by the company (No. 30). Even the present law requires public companies to lay open to a considerable extent transactions outside the ordinary run of current business. Service agreements with business executives are not 'contracts entered into in the ordinary course of business'. They are as vital from the shareholders' and the public's point of view as the purchase of new business premises or the acquisition of a patent. Why, then, should they form an exception to the general rule and remain a closely guarded secret? The need for this disclosure is much greater than it is in the case

of contracts with outsiders, because they raise the problem of the conflict between interest and duty. It is to be hoped that Parliament will enforce the disclosure of individual fees, salaries, pensions and compensation for loss of office.

VII

The thorniest of all the thorny problems confronting the Committee was that of nominee shareholders. While most of the questions discussed in the Report have, in one form or another, occupied the minds of company lawyers everywhere, this issue of nominee shareholdings is a peculiarly English problem. It does not arise where bearer shares are usual, although even there the exercise by banks of voting powers vested in their customers is a widespread and much discussed phenomenon. The Cohen Committee make the interesting point (No. 77) that it is now the practice to call up 'almost at the outset the whole of the issued share capital'. One of the weightiest arguments against nominee shareholdings is thereby removed, because the outside creditor's interest in inspecting the register of members and in finding out the names of those still liable to pay calls no longer exists. It may be said that section 70 of the present Act permits the issue of bearer shares, provided the amount of the shares has been fully paid. Why, if the law thus allows anonymity of shareholding, should there be any objection to nominees? One answer might be that section 70 does not operate unless the articles have made specific provision to this effect, while a beneficial owner who holds his shares through a nominee, forces the anonymity of his own beneficial membership upon a possibly unwilling company.

The Committee have refused to recommend the prohibition of registrations in the names of nominees (No. 78), nor have they recommended a compulsory register of beneficial ownership for all companies—a recommendation which might have necessitated a repeal or recasting of the present section 101. On the other hand, they have (No. 79) enumerated four arguments militating in favour of a disclosure of beneficial ownership. Two of these—the danger of acquisition of control by foreigners, and the case of the press—might be dealt with by special legislation, the third—the danger of unscrupulous directors making illegitimate use of inside information under the cloak of nominees—has been discussed in a different context, and largely removed by the

Committee's own recommendations (No. 87). There remains the objection to anonymous shareholdings 'that a register of beneficial ownership would be useful to a shareholder who wishes to consult his fellow shareholders as to the affairs of the company'. The Committee recognise the weight of this argument. Indeed 'in principle' they 'consider that shareholders and the public are entitled to know in whom control is vested', and that no legitimate purpose would be prejudiced by a full disclosure of beneficial ownership. They reject it solely on the ground that it would impose a great deal of work and that it would be difficult to enforce (No. 80).

Clearly the Committee are in favour of maintaining the present system of registered shareholdings and would not welcome a more widespread use of bearer shares. In spite of whatever arguments may be adduced in favour of the nominee practice, the fact remains that it frustrates the objects of the provisions of the law which deal with the register of members. On the other hand, the argument that a prohibition of nominee registrations or a compulsion to register beneficial ownership would be difficult to enforce carries much weight (though its strength is diminished by the fact that the Committee themselves suggest a method of enforcement in the case of 'exempt' private companies (No. 53)). Moreover, any form of suppression of anonymous ownership would be useless unless it was accompanied by a repeal of section 70 of the present Act which the Committee for good reasons was not prepared to recommend (No. 83).

It is in circumstances such as these, in cases which defy a solution by a legislative formula, that recourse must be had to the flexible machinery of administration. The Committee recommend that the Board of Trade should be empowered to investigate through an inspector the ownership of shares in any company, if they consider it necessary in the public interest, and that they may, in this event, direct the company not to pay dividends or permit the exercise of any rights (including rights of transfer) attaching to such shares (Nos. 84, 85). This possibility of investigation by the Board of Trade is probably the only way in which this Gordian knot could have been cut. The Committee have also recommended two auxiliary innovations: a declaration by the transferee of shares whether he is the beneficial owner or a nominee (No. 81—this surely would have to be supple-

mented by a corresponding duty on the part of the first subscriber), and an obligation imposed upon the beneficial owner of ten per cent. or more of the capital or any class of capital to disclose his interest, which would be entered in a register of beneficial ownership (No. 82). One cannot help wondering whether this complicated mechanism would be easier to handle than a straight prohibition, subject to certain general exceptions (*e.g.*, in the case of active trustees) and to a dispensing power vested in the Board of Trade.

The separation of legal ownership and beneficial interest is a perennial problem of English law. Henry VIII did not solve it, and it will hardly be solved this time.

VIII

We can only note in passing a number of minor recommendations such as those to simplify the annual return (No. 73) and the keeping of registers (Nos. 74, 75, 173), to prohibit the exemption from liability of a debenture trustee (No. 64) and to assimilate the legal status of a receiver appointed by the Court and of a receiver appointed by a debenture holder (No. 68). In connection with winding-up the Committee propose to reform the 'declaration of solvency' (Nos. 144, 145), to strengthen the legal provisions against fraud (Nos. 146 to 151), and to enlarge the preferential rights of employees and workmen (No. 153). Their most interesting suggestion in this context is that the Court should have power to impose a settlement of their internal disputes upon the shareholders, including the purchase of the shares of an oppressed minority by the majority at a price to be fixed by the Court. Such an order could be made whenever a shareholder petitions for a compulsory winding-up under the 'just and equitable' clause (No. 152).

The ultimate sanction for compliance with the standards of conduct exacted by the law must be an efficient machinery of criminal prosecution. The Committee are highly critical of the existing system, mainly on the ground that the Director of Public Prosecutions is required to consider not only the probability of success but also whether it is in the public interest that he should prosecute. In Scotland the Lord Advocate must prosecute whenever there is a likelihood of securing a conviction. The Committee 'have no hesitation in recommending that, at least as regards offences under the Companies Act, the English system should

be assimilated to the Scottish and that, accordingly, it should be laid down that in any case in which the Director considers that a prosecution ought to be instituted, he should institute it himself' (No. 161). This is a matter of profound significance, far beyond company law itself; if this vital recommendation is adopted the powers conferred and the duties imposed upon the Director will be similar to those of a public prosecutor in the American and Continental sense. The time-honoured English system of 'private prosecutions' has largely proved to be inadequate in the face of modern company practices.

O. Kahn-Freund.

DIVISIONAL COURT PRECEDENTS

A SERIES of proceedings [1] which were brought to test the legality of newspaper advertisements of certain competitions raises a number of questions on the status and binding effect of rulings of a Divisional Court. A metropolitan magistrate, who had decided a case in accordance with the decision [2] of a Chancery judge of first instance, refused to state a case for the opinion of the High Court on the ground that, so far as he was concerned, the law on the matter was decided and, therefore, that there was no point of law on which he could properly state a case. He relied on the decision in *R.* v. *Shiel* [3] to the effect that a magistrate ought not to be ordered to state a case when he has decided the point of law in accordance with a previous decision upon the same point in the Queen's Bench Division from which there was no right of appeal. *R.* v. *Shiel*, however, was held by a Divisional Court [4] not to excuse the magistrate from stating a case and accordingly an order of mandamus was issued requiring him to state a case for the opinion of the High Court.

R. v. *Shiel* was distinguished on the ground that in that case the previous precedent [5] had issued from a Divisional Court, while in the instant case the decision which the magistrate had 'held to be of the same effect as the decision in *Carritt* v. *Godson* was one by a learned judge of great authority in the Chancery Division in a case in which he was not the final court of appeal'. Lord Caldecote C.J. continued his judgment as follows [6]:—

> If, in the present case, the magistrate states a case, there is, in my opinion, an obvious point of law which is open to the party aggrieved by the magistrate's decision, and that is whether or not the judgment of Eve J. was a right decision in the matter before him, and also, no doubt, whether or not that decision is binding on this Court. The party aggrieved by the magistrate's decision asks for an opportunity of bringing that decision before this Court, which is the final court of appeal in a criminal

[1] *R.* v. *Sir Bertrand Watson; Ex p. Bretherton*, [1945] K.B. 96, Div. Ct.; *Bretherton* v. *U.K. Totalisator Co., Ltd., ibid.*, 555, Div. Ct.; *Elderton* v. *U.K. Totalisator Co., Ltd.*, 61 T.L.R. 529, Uthwatt J.; *S.C.*, [1946] K.B. 57, C.A.
[2] *Elderton* v. *U.K. Totalisator Co., Ltd.*, [1935] Ch. 373, Eve, J.
[3] (1900), 82 L.T. 587, C.A.
[4] *R.* v. *Sir Bertrand Watson; Ex p. Bretherton*, [1945] K.B. 96.
[5] *Carritt* v. *Godson & Son*, [1899] 2 Q.B. 193, Div. Ct.
[6] [1945] K.B., pp. 99–100.

> cause or matter, and I cannot see how it can be said that a judgment of a judge who is not the final court of appeal is, nevertheless, so final that it cannot even be questioned in this Court which is the final court of appeal for these proceedings.

The above passage from the judgment of Lord Caldecote C.J., while allowing the Divisional Court the last word in the matter, leaves it as an open point of law whether or not the Court would be bound by the decision of the judge of first instance. When, however, the point of substantive law duly came before a Divisional Court on a case stated,[7] that Court had no hesitation in refusing to follow the earlier decision of the judge of first instance. Lord Goddard, in delivering the judgment of the Court, said [8]: ' This appeal is brought to test the correctness of that decision '.

Yet the test did not prove conclusive for when, shortly afterwards, the same point of law came before Uthwatt J. in an action in the Chancery Division [9] he apparently did not hold himself bound by the Divisional Court ruling. Faced by conflicting decisions of a judge of first instance in the Chancery Division and a later decision of a King's Bench Divisional Court, he said :—

> In the light of this conflict I am bound, I think, to express my own view rather than to treat the matter as concluded in this Court by the later decision; and I take this course with the less hesitation by reason of the assurance given to me that, whichever way I decide the point, the case will go to a higher Court.

Uthwatt J. did, in fact, decide the point of law in the same way as the Divisional Court, and his decision was upheld on appeal.[10] The Court of Appeal did not refer to the question of the binding effect of the precedents.

The uncertain handling in this group of cases of the doctrine of *stare decisis* in its application to Divisional Court rulings is not the result of scanty judicial authority on the subject. There have been many relevant pronouncements since the Judicature Act, 1873, made it necessary for the decisions of the newly established Divisional Courts to be fitted into the system of judicial precedent. The extensive literature which has been devoted to this system has hitherto given no special

[7] *Bretherton* v. *U.K. Totalisator Co., Ltd.*, [1945] K.B. 555.
[8] *Ibid.*, p. 559.
[9] *Elderton* v. *U.K. Totalisator Co., Ltd.*, 61 T.L.R. 589.
[10] [1946] K.B. 57, C.A.

consideration to the precedents of the Divisional Courts. They can best be considered in relation to the decisions of other Courts before the question of whether or not Divisional Courts are bound by their own decisions is dealt with.

DECISIONS OF JUDGES OF FIRST INSTANCE

Authority for saying that a judge of first instance is bound to follow a decision of a Divisional Court is to be found in the case of *Village Main Reef Gold Mining Co., Ltd.* v. *Stearns*, in which Kennedy J. said[11]: 'That was a decision of a Divisional Court and is therefore binding on me . . . I must follow that decision'.

Conversely, it has even been held by a judge sitting in a Divisional Court that he was bound by a judgment of a judge of first instance. In *Casson* v. *Churchley* Grove J. said[12]: 'In accordance with the rule that where there is power to appeal the Courts are bound by the decision of Courts of co-ordinate jurisdiction, we are bound by the judgment of Fry J.'[13] The reason for this apparently curious view was that the Divisional Court was hearing an appeal from a county court, and a further appeal lay to the Court of Appeal to which appeal from judges of first instance also lie. If the fact of subjection to the same court of appeal makes two courts co-ordinate in their jurisdiction, so far as the binding force of their precedents are concerned,[14] it can have small effect on the authority of contemporary Divisional Court decisions, even if Grove J.'s opinion is acted on. His opinion could never have affected criminal appeals by way of case stated as in those appeals the Divisional Court is the final court of appeal, and it could have touched county court appeals only before the passing of the Administration of Justice (Appeals) Act, 1934, directed them to be heard by the Court of Appeal. Grove J.'s opinion does, however, provide some historical basis for Lord Caldecote C.J.'s uncertainty in *R.* v. *Sir Bertrand Watson*[15] whether or not the Divisional Court in that case was bound by the decision of Eve J. In *Bretherton* v. *U. K. Totalisator Co.*,

[11] (1900), 5 Comm.Cas. 246, 247, 248.
[12] (1884), 53 L.J.Q.B. 335, 336. Huddleston B. (p. 337) found 'clear authority on the proposition by a court of co-ordinate jurisdiction' with which he agreed.
[13] *Swift* v. *Pannell*, 24 Ch.D. 210.
[14] This argument has not been applied to the Court of Appeal and the Court of Criminal Appeal; they hold themselves free not to follow each other's decisions, although they are subject to review by the same appellate tribunal.
[15] *Cit. sup.*, p. 257.

Ltd.,[16] where there was no power to appeal further, the Court expressed no doubt about its not being bound by that decision and it was not followed. This attitude accords with that of Lord Alverstone C.J. in *Brass* v. *L. C. C.*[17]: ' Though we are not bound by the decision of a judge sitting alone in the Chancery Division, we should not differ from it unless we were clearly satisfied that it was wrong '.

DECISIONS OF THE COURT OF APPEAL

A Divisional Court is bound to follow a decision of the Court of Appeal. In *Read* v. *Joannon* Lord Coleridge C.J. said[18] that the Divisional Court in which he was sitting had ' no right to disregard ' decisions ' whether by a court of appeal or by a court of co-ordinate jurisdiction '. This was said in a case in which a further appeal lay to the Court of Appeal, but there is no support for the distinction in this connection between such a case and one in which the Divisional Court is the court of last resort. In *Scott* v. *Director of Public Prosecutions*, in a Divisional Court which was hearing an appeal by way of case stated, Atkin J. said[19] with regard to a previous decision: ' This is a decision by the Court of Appeal which, so far as I am aware, has never been questioned, and is binding on us '. Recently, on a case stated, Humphreys J. followed[20] ' a decision which is clearly binding upon us, because it is a decision of the Court of Appeal '.

DECISIONS OF THE COURT OF CRIMINAL APPEAL

There appears to be no authority on the question whether a Divisional Court is bound by a decision of the Court of Criminal Appeal. The mere fact that the Divisional Court in a criminal case is a court of last resort would not prevent its being bound, for it is bound by decision of the Court of Appeal in the same circumstances. But the authority of the decisions of the Court of Appeal over Divisional Courts may depend on the fact that the Courts are the higher and lower branches respectively of the same Court, the Supreme Court of Judicature. The Court of Criminal Appeal stands apart and could not support

[16] *Cit. sup.* p. 258.
[17] [1904] 2 K.B. 336, 340, Div. Ct. (case stated).
[18] 25 Q.B.D. 300, 302, 303, Div. Ct. (City of London Ct. appeal). In *Kinahan & Co., Ltd.* v. *Parry*, [1910] 2 K.B. 389, 393, Div. Ct. (Cnty. Ct. appeal), Lord Coleridge J. said that he would have been bound by a certain decision of the Court of Appeal if it had been in conflict with a later Divisional Court decision.
[19] [1914] 2 K.B. 868, 879.
[20] *Moore* v. *Elphick*, [1945] 2 A.E.R. 155, 160.

the authority of its decisions by this argument. On the other hand, the Court of Criminal Appeal is an appellate court from superior courts, assizes being superior courts, while a Divisional Court is an appellate court from inferior courts. It would seem, however, logical to say that if the Court of Appeal is justified in refusing to follow the decisions of the Court of Criminal Appeal, as it claims, Divisional Courts are justified also; if the rule were otherwise a Divisional Court might find itself presented with two conflicting decisions of different courts both of which were binding. It must be admitted, however, that a general rule that a Divisional Court is bound by a decision of the Court of Criminal Appeal might reasonably be framed subject to a proviso that, in the case of such a conflict of superior decisions, that of the Court of Appeal must be followed. On what may perhaps be called the merits of the question the arguments are fairly evenly divided. In practice, points of criminal law are just as thoroughly, if not more thoroughly, considered in a Divisional Court as they are in the Court of Criminal Appeal. A case stated may come before two judges and not three, as in the Court of Criminal Appeal, but three judges is now the usual number on an appeal by way of case stated. And Divisional Courts appear more ready to reserve judgment than does the Court of Criminal Appeal. But the fact that a Divisional Court usually gives separate judgments may be taken to weaken the force of a ruling compared with one which is the judgment of the court, as the rulings of the Court of Criminal Appeal almost invariably are.

Although one court is concerned with indictable offences and the other with offences punishable on summary conviction there is much substantive criminal law common to the two jurisdictions. The text-books draw too rigid a line between the decisions in the two courts: there are authorities in *Stone* which could, but which do not, find a place in *Archbold*, and *vice versa*. The question of the comparative authority of the two types of courts of criminal appeal did arise in connection with the Court for the Consideration of Crown Cases Reserved. In *Hawke* v. *Mackenzie* Darling J. said [21]: 'I agree that the case of *Stoddart* v. *Argus Printing Co.*[22] is in conflict with *R.* v. *Stoddart* [23] and that the latter decision must prevail'. And

[21] [1902] 2 K.B. 225, 232, Div. Ct. (case stated).
[22] [1901] 2 K.B. 470, Div. Ct. (case stated).
[23] [1901] 1 K.B. 177, Ct.C.C.C.R.

Channell J. was of the same opinion [24]: 'I also agree that we are not bound by *Stoddart* v. *Argus Printing Co.* which is in conflict with *R.* v. *Stoddart*. As there is no appeal from our present decision we must decide between the conflicting decisions, and I have no doubt that *R.* v. *Stoddart* is the one by which we are bound and which we ought to follow'. On the strength of this precedent the Divisional Court may hold, when the question arises, that it is similarly bound by a decision of the modern Court of Criminal Appeal.

DECISIONS OF DIVISIONAL COURTS

(a) With regard to decisions of courts of co-ordinate jurisdiction the common law drew a distinction between cases in which there was a right of appeal to a higher court and cases in which the decision of the court was final. In *Taylor* v. *Burgess* Pollock C.B. said [25]:—

> When a case can be taken to a court of error, the decision of one court of co-ordinate jurisdiction ought to be binding on the others. When, however, there is no means of appealing to a court of error, there is not the same obligation to follow the decision of another court; and accordingly we sometimes find courts of co-ordinate jurisdiction differing from each other.

This distinction has been acted on in Divisional Courts. In delivering the judgment of the court in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, Charles J.[26] said of an earlier Divisional Court decision: 'Were it not that it is a criminal case in which no appeal is possible we should feel bound to act on the judgment of the majority of the court' in that case. It has already been observed [27] that this distinction has been applied so as to make a Divisional Court bound by a decision of a judge of first instance in a case in which an appeal lay to the Court of Appeal. The distinction has not been referred to in express terms in recent years though it is supported by much authority, which will be noticed later, and was acted on in practice for a considerable time. A puzzling situation was presented to Pollock B. in *Vernon* v. *Watson*,[28] when a

[24] [1902] 2 K.B., p. 233.
[25] (1859), 5 H.&N. 1, 5. This distinction also applies in the Irish and Australian Courts: see an article in 61 L.T. Newsp. (1876) 245.
[26] [1891] 2 Q.B. 170, 179.
[27] *Supra*, p. 259.
[28] [1891] 1 Q.B. 400, Div. Ct. (Cnty. Ct. appeal).

Divisional Court from which there was a right of appeal had to consider a precedent of a Divisional Court from which there had been no right of appeal. Pollock B. did not give any clear guidance in the difficulty [29] :—

> Although I do not go so far as to say that in every case and under all circumstances the Court is absolutely bound by a decision of another Divisional Court, still, according to all the ordinary rules by which the practice of the Court is regulated, the decision to which I have referred is one by which we should abide. It is urged that we need not follow that decision because it was a case in which there was no right of appeal from the Divisional Court. That is a contention which cannot prevail; but, under the circumstances, we will give leave to appeal.

(b) There are cases in which the Lord Chief Justice has thought it desirable to call together a specially constituted Divisional Court for the purpose of considering whether a precedent should be disregarded. Lord Coleridge C.J. on an appeal by way of case stated summoned [30] a Divisional Court consisting of himself and four other members to consider a previous decision of a Divisional Court of three judges of whom he was the dissentient. According to the judgment of the Court,[31] ' there being no appeal, and the matter being of general importance, it has been considered right to have the question reargued before a specially constituted Divisional Court of five members '. The previous decision was not followed; the headnote to the report declares that it was ' overruled ', but the judgment does not expressly claim to have overruled it.

On the strength of this example Lord Russell of Killowen C.J. called together [32] a Divisional Court consisting of himself, the President of the Probate, Divorce and Admiralty Division, a Lord Justice of Appeal, and four puisne judges to rehear an appeal by way of case stated in which the Lord Chief Justice and Mathew J. had differed in opinion. In giving judgment Lord Russell of Killowen C.J. said [33] :—

> In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts usually consisting of two members, and that, those cases being in their nature criminal, there has been no

[29] *Ibid.*, p. 402.
[30] *Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q.B. 170.
[31] Delivered by Charles J., *ibid.*, 179.
[32] *Kruse* v. *Johnson*, [1898] 2 Q.B. 91.
[33] *Ibid.*, 102.

> judgment of a Court of Appeal upon them. It is for this reason that the present special Court has been constituted. I cannot doubt that this Court has authority to review and, if it thinks fit, to differ from any prior decision of a Divisional Court on the subject: see *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.*[34]

According to the distinction which turned on the existence or non-existence of a right of appeal, the right of refusal to follow a decision given on an appeal by way of case stated was possessed by any Divisional Court, and Lord Russell of Killowen C.J. did not hesitate to depart from precedent in such cases.[35] The object of summoning a special Court was that its decision would be treated as authoritative even if it were denied the formal power of overruling. Yet Mathew J. in *Kruse* v. *Johnson* said on the rehearing [36] on which, abiding by his previously expressed opinion, he was the only dissentient:—

> The judgments of the majority of the judges by whom this case is decided will, no doubt, be entitled to great respect from those who may have similar cases to deal with; but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the difference of judicial opinion that may arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way.

On this view, and there is logic in its favour, the decision of a specially constituted Divisional Court, at least where there is no further right of appeal, has only the status of a conflicting precedent [37] when it refuses to follow an earlier decision, though naturally a precedent of great weight, short of being strictly binding.

There appears to be no recent instance of a specially constituted Divisional Court disregarding a former precedent. If the rule at the present day is that a Divisional Court is normally bound by its own decisions there is much to be said for a reserve power possessed by a special sitting of the Court.[38] A special sitting of the 'full' Court of Appeal is just as much bound by its previous decisions as is the ordinary Court of

[34] *Cit. sup.*, n. 30.
[35] *Vide infra*, p. 265.
[36] [1898] 2 Q.B. p. 113.
[37] For conflicting Divisional Court precedents *vide infra*, p. 270 *et seq.*
[38] As is the practice in the Scottish Court of Session: see Lord Macmillan (95 L.J.Newsp. (1945), 7) referring to John C. Gardner's *Judicial Precedent in Scots Law* (Edinburgh, 1936).

three members.[39] On the other hand, the Court of Criminal Appeal when composed of more than the usual quorum of three members has refused to follow[40] a previous decision of the Court, although normally it holds itself bound by its own decisions.

(c) The neglect of the distinction between Divisional Courts which are courts of last resort, and those which are not, did not lead to a weakening of the binding force of precedent. The contrary was the case, for the strict rule came to be accepted by all types of Divisional Court. In the nineteenth century the Queen's Bench was not strictly bound by a previous decision in a magisterial case,[41] and Lord Russell of Killowen C.J. had no hesitation on an appeal by case stated to a Divisional Court in refusing to follow a previous Divisional Court ruling even when he had not called together a specially constituted court. In *Logsdon* v. *Booth*[42] he refused to follow an earlier case, and in delivering the judgment of the Court which consisted of three members said[43]:—

> Differing from the decision of the Court in that case, ought we nevertheless to act upon it? We think not. The law being criminal in its nature could not have been brought under review by appeal . . . we say the case of *Booth* v. *Ferrett* was wrongly decided.[44]

In another case heard on the same day he again refused to follow[45] an earlier decision: 'In our opinion that case was wrongly decided'.

There are, however, to be found expressions of opinion by puisne judges of this period that they were bound to follow previous decisions on appeals by way of case stated.[46] But the

[39] *Young* v. *British Aeroplane Co., Ltd.*, [1944] K.B. 718, pp. 725–728, C.A.

[40] *R.* v. *Norman*, [1924] 2 K.B. 315.

[41] *R.* v. *Pilkington* (1853), 2 El.&Bl. 546, *per* Lord Campbell C.J. at p. 552, and Coleridge and Crompton JJ. at pp. 554, 555.

[42] [1900] 1 Q.B. 401, Div. Ct. (case stated).

[43] *Ibid.*, pp. 413, 414.

[44] The headnote to the report declares that *Booth* v. *Ferrett* (1890), 25 Q.B.D. 87, Div. Ct. (case stated) was 'overruled'. In *Logsdon* v. *Trotter*, [1900] 1 Q.B. 617, 623, Channell J. said that *Booth* v. *Ferrett* had 'been conclusively disposed of by the decision of *Logsdon* v. *Booth*'.

[45] *Armstrong* v. *L. C. C.*, [1900] 1 Q.B. 416, 425, Div. Ct. (case stated). The headnote again declares that the case was 'overruled'.

[46] See Channell J. in *White* v. *Morley*, [1899] 2 Q.B. 34, 38, Bigham J. in *Thomas* v. *Van Os*, [1900] 2 Q.B. 448, 453, Bruce J. in *Moses* v. *Marsland*, [1901] 1 K.B. 668, 671, Wills J. in *L. C. C.* v. *Illuminated Advertisements Co.*, [1904] 2 K.B. 886, 891, Bray J. in *Giebler* v. *Manning*, [1906] 1 K.B. 709, 718, all in Div. Cts. on case stated. Wright J. in *Jones* v. *Walters* (1898), 14 T.L.R. 265, 266, said the Court was bound 'unless there was any very strong reason to the contrary'. See also Ridley J. in *Wright & Son* v. *Bull*, [1900] 2 Q.B 125, 127 (Cnty. Ct. appeal). As early as 1882 Grove J.

view that a Divisional Court is bound by its own previous decisions, whatever the nature of the appeal, probably owes its general acceptance to Lord Russell of Killowen C.J.'s successor, Lord Alverstone. In *Morris* v. *Beal*,[47] when the Court was considering a previous decision of a Divisional Court of which Lord Alverstone C.J. was a member, he said[48]: 'It is possible that grounds may be suggested for reviewing that decision, but at all events we are bound by it here'. He considered the question of the binding effect of precedents more fully in *L. C. C.* v. *Schewzik*[49] in which he followed a prior decision with reluctance, as he thought he ought not to distinguish it, and added[50]:—

> I only desire to say, coming to that conclusion, that there is an important matter which I have mentioned more than once since I have been sitting in this Court, and I refer to it again because of its extreme importance, and that is the importance of uniformity in the decisions of this Court. The Court of Appeal have recently recognised that it is desirable in the public interest, and in order that people may know with certainty what their position is, that courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the Court to say that the previous decisions ought not to be followed'.

After this pronouncement Lord Alverstone C.J. continued to hold himself bound by previous decisions.[51]

Lord Alverstone C.J. does not give references to the case or cases in the Court of Appeal which he had in mind. He may have been thinking of *L. C. C.* v. *Wandsworth B. C.*[52] in which the Court of Appeal reversed a decision of a Divisional Court of which he was a member, Vaughan Williams L.J. saying[53]: 'In this case the Divisional Court only followed the decision in

expressed this view (*Davies* v. *Evans*, 9 Q.B.D. 238, 241, Div. Ct. (case stated)), but he later approved of the effect of the distinction between the two types of appeal: *Casson* v. *Churchley* (1884), 53 L.J.Q.B. 335, 336, Div. Ct. (Mayor's Ct., appeal), *vide supra*, p. 257.

47 [1904] 2 K.B. 585, Div. Ct. (case stated).

48 *Ibid.*, p. 590. Kennedy and Phillimore JJ. both agreed that the decision was binding (see p. 592).

49 [1905] 2 K.B. 695, Div. Ct. (case stated).

50 *Ibid.*, p. 700. Ridley J. said (p. 702): 'I should certainly have come to the contrary conclusion myself, but I follow what the Lord Chief Justice says, and I consider myself bound by that case'.

51 *R.* v. *Roberts*, [1907] 2 K.B. 878, 883, Div. Ct. (certiorari); *Evans* v. *Weatheritt*, [1907] 2 K.B. 80, 84, Div. Ct. (case stated).

52 [1903] 1 K.B. 787.

53 *Ibid.*, p. 806.

Fulham Vestry v. *Minter*[54] which bound them. It does not bind us, and, as we think it was wrongly decided, we must reverse the decision of the Divisional Court'. And in *R.* v. *Sunderland JJ.*,[55] another successful appeal from a Divisional Court of which Lord Alverstone C.J. was a member, A. L. Smith M.R. said[56]: 'I do not see how the Divisional Court could have decided otherwise than they did having regard to the decision in *R.* v. *Stockport JJ.*,[57] but we are not bound by that case'.

When the Court of Appeal made these declarations on the binding force of Divisional Court precedents it was referring to cases in which the Divisional Court was not the final court of appeal. The Court of Appeal did not say that every type of Divisional Court was bound by its own decisions. The question of the binding force of such decisions when the Divisional Court is the final court of appeal did not directly come before the Court of Appeal. The question could not, in fact, ever come directly before the Court of Appeal. But Lord Alverstone C.J., in accepting the ruling of the Court of Appeal, applied it without discrimination to Divisional Courts generally. In so doing he was probably also influenced by the example of the Court of Appeal holding itself bound by its own decisions.

The strictness of the new rule might have been eased if a wide interpretation had been given to the 'strong grounds' mentioned[58] by Lord Alverstone C.J. as justifying a departure from precedent. But this qualification underwent no development: in later cases the strict rule is stated shorn of this limitation. In 1916 Avory J. said[59] of a case decided in the previous year: 'We are bound by the decision there given, if the same state of facts exists'. In 1923 Lord Hewart C.J. expressed[60] the same opinion of a Divisional Court decision: even if he were disposed to differ from it he 'should still be bound by the authority of that decision'. This recognition

[54] [1901] 1 K.B. 501, Div. Ct.
[55] [1901] 2 K.B. 357.
[56] *Ibid.*, 368.
[57] (1896), 60 J.P. 552, Div. Ct.
[58] In *Schewzik* v. *L. C. C.*, *cit. sup.*, p. 266.
[59] *R.* v. *Burnley JJ.*, 115 L.T. 525, 530, Div. Ct. (case stated), referring to *Theatre de Luxe* (*Halifax*), *Ltd.* v. *Gledhill*, [1915] 1 K.B. 49, Div. Ct. Atkinson J. said in *Harman* v. *Butt*, [1944] K.B. 491, 498, referring to these two cases: 'The Divisional Court, which was of co-ordinate jurisdiction with the Court which decided the *Halifax Case*, was not inclined to follow the *Halifax Case* unless it was driven to it'.
[60] *R.* v. *Godfrey*, Div. Ct. (habeas corpus) in 92 L.J.K.B. 205, 207; 128 L.T. 115, 117; 27 Cox C.C. 338, 342. Similarly the other members of the Court, Avory and Sankey JJ., in [1923] 1 K.B. 24, 30.

of the strictly binding nature of all previous decisions in the Divisional Courts has continued down to the present time. In 1944 Lawrence J. said,[61] referring to a case decided in the same year, ' This point has already been disposed of by a Divisional Court in *British Doughnut Co., Ltd.* v. *Dale* [62] which would be binding on us '. In two judgments [63] of Humphreys J. in 1945 we have these statements : ' That case is clearly binding on this Court ', and ' That is a decision which is binding upon us '.

The Court of Appeal has continued to express approval,[64] on appeals from Divisional Courts, of the action of the court below in holding itself bound by its own decisions. In *De Vries* v. *Smallbridge*,[65] in which the Divisional Court had followed a previous decision of a Court composed of three judges, Scrutton L.J. commented that the members of the court below ' thought they ought to observe the rule of that Court, which is to respect the decision of a Court of three judges, and so they reversed the decision of the county court judge '. This suggestion that the binding effect of a Divisional Court ruling depends on the number of members [66] of the Court seems to be unique. It could not have found favour under the older practice [67] of the Divisional Court, according to which three judges sat in cases in the Crown paper and two in cases in the civil paper; appeal lay from the court of two judges while the court of three judges was, in most cases, the final court of appeal. The distinction, if it had existed, would have been the other way, unless Scrutton L.J. is suggesting that a county court appeal, heard by three judges in place of the usual two, would provide, by exception, a binding precedent even though there was a right of appeal. But elsewhere [68] he stated in

[61] *Concentrated Foods, Ltd.* v. *Champ*, [1944] K.B. 342, 348, Div. Ct. (case stated).
[62] [1944] K.B. 228, Div. Ct. (case stated).
[63] *R.* v. *Sunderland JJ.*, [1945] K.B. 502, 508, Div. Ct. (case stated), referring to *McGregor* v. *Telford*, [1915] 3 K.B. 237, Div. Ct. (case stated), and *Ross* v. *The English Steel Corporation, Ltd.*, [1945] 2 A.E.R. 606, 608, Div. Ct. (case stated), referring to *Felton* v. *Heal*, [1920] 3 K.B. 1, Div. Ct. (case stated). And *a fortiori* up to the time of the abolition of the hearing of county court appeals by Divisional Courts the Judges in these Courts continued to hold themselves bound by a single previous decision, *e.g.*, Acton J. in *Baker* v. *E. Longhurst & Sons, Ltd.*, [1933] 2 K.B. 461, 462, 463, Goddard J. in *Knott* v. *L. C. C.*, [1934] 1 K.B. 126, 132.
[64] *Phillips* v. *Copping*, [1935] 1 K.B. 15, 18, *per* Scrutton L.J., *Fordree* v. *Barrell*, [1931] 2 K.B. 257, 260, *per* Scrutton L.J.
[65] [1928] 1 K.B. 482, 486.
[66] It has no relation to the constituting of a special Divisional Court of more than the usual number of members for the express purpose of considering a particular precedent: *supra*, p. 263.
[67] See *Annual Practice*, 1945, p. 1353.
[68] *Supra*, n. 64.

general terms that a Divisional Court was bound by its own decisions. When a Divisional Court is composed of members of the Court of Appeal sitting as additional judges of the King's Bench Division the Court will hold itself just as much bound as a Divisional Court constituted in the ordinary way.[69]

When a Divisional Court is equally divided and the appeal fails as a consequence a subsequent Divisional Court is not bound to follow the decision; it will follow the judgment which it thinks correct.[70] The rule in the Court of Appeal when that Court is equally divided is now the other way; the precedent is treated as being one in which the appeal was dismissed by a majority.[71] But a Divisional Court is, like the Court of Appeal,[72] not bound[73] by a decision given *per incuriam*. Another kind of exceptional instance in which a Divisional Court has held itself not to be bound is found in *Re a Solicitor*[74] where Lord Caldecote C.J. held[75] that, having regard to the language used by Avory J. in an earlier case,[76] the Court was ' free to arrive at any decision which it thinks right in the matter without treating that decision as a binding authority '. In the earlier case the Court did not have the opportunity of fully considering the question raised though, as Avory J. said,[77] it was ' impossible for the Court to do justice in this matter without creating a precedent, which may or may not be followed in the future when further argument may be heard '. This attempt to nullify the future binding effect of the precedent created was successful.

The Divisional Courts, in holding themselves strictly bound by a previous decision, have adopted the rule of the Court of

[69] *Harrison* v. *Ridgway* (1925), 133 L.T. 238, 239, Div. Ct. (Cnty. Ct. appeal), *per* Bankes and Scrutton L.JJ., *Fordree* v. *Barrell*, [1931] 2 K.B. 257, 260, C.A. (Div. Ct. appeal), *per* Scrutton L.J., *De Vries* v. *Smallbridge*, [1928] 1 K.B. 482, 486, C.A. (Div. Ct. appeal), *per* Scrutton L.J.

[70] *Grocock* v. *Grocock*, [1920] 1 K.B. 1, 11, 13, Div. Ct. (case stated), *per* Darling, Avory, and Salter JJ.

[71] *Hart* v. *Riversdale Mill Co., Ltd.*, [1928] 1 K.B. 176, C.A., in which Scrutton L.J. adopted (pp. 188, 189) the well-established rule in the House of Lords that the House is bound by a previous decision in which the House was equally divided. But Scrutton L.J. does not notice two occasions on which the Court of Appeal had expressed the opinion that it would not be bound in such circumstances: *The Vera Cruz* (*No.* 2), 9 P.D. 96, 98, C.A., *per* Brett M.R., *Smith* v. *Lambeth Assessment Committee*, 10 Q.B.D. 327, 328, C.A., *per* Brett L.J.

[72] *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] K.B. 718, C.A., pp. 729, 730.

[73] *R.* v. *de Grey*, [1900] 1 Q.B. 521, Div. Ct., where a previous decision, given in a case in which the Court's attention had not been drawn to ' three strong authorities ', was not followed.

[74] [1944] K.B. 427, Div. Ct.

[75] *Ibid.*, p. 431.

[76] *Re a Solicitor*, [1924] 1 K.B. 699.

[77] *Ibid.*, p. 700.

Appeal in preference to that of courts of first instance in which the judge is not absolutely bound by a previous decision of the same court. It has often been stated that the absolutely binding effect of precedent came to be accepted only in the nineteenth century. In the case of the Divisional Courts this stage in the history of judicial precedent was reached only in the twentieth century.

CONFLICTING PRECEDENTS

When precedents of a kind which are normally binding on the court are in conflict with one another, the obligation on the court, if any, is uncertain, although the problem is not a new one.[78] On this subject Romilly M.R. said[79]: 'I have usually not followed decisions of courts of contemporary co-ordinate jurisdiction in cases where such decisions have been contradictory to a long line of authorities, and I have thought that the early cases were right'. Pollock C.B. acted in the same way when presented with a similar conflict in the precedents, though he cautiously added[80]: 'I should have felt myself bound by the last authority upon the question of a court of co-ordinate jurisdiction, if the previous one had been adverted to and had been deliberately overruled'. In the same case Parke B. was in a minority in thinking that the single precedent should be followed rather than the earlier series of decisions. He confessed himself surprised at the case as 'being alike at variance with the previous authorities and with the words of the statute', nevertheless he concluded[81]: 'If the decision of the present case rested with me, I should act upon that authority as being the last upon the point, by giving judgment for the defendant, leaving the plaintiff to bring his writ of error. In this respect I differ from the other members of the Court'. When the conflict is a simple conflict between two contradictory decisions perhaps the court may be more readily allowed to exercise its untrammelled judgment. As Lord Abinger C.B.

[78] See the present writer's articles 'Conflicting Precedents' (56 L.Q.R. 457) and 'Precedent in Equity' (57 L.Q.R. at pp. 260–262).

[79] *Re Buller's Settlement* (1862), 8 Jur. p. 205.

[80] *Watts* v. *Rees* (1854), 9 Ex. 696, 700. As Platt B. put it (*ibid.*, 700, 701): 'In this conflict of decisions in the same court upon this statute, our judgment must necessarily conflict with one of them, for we have no other course open to us except to reject the one and follow the other'. According to the report in 23 L.J.Ex. 238 the Court was *bound* to follow the series of decisions: 'I feel myself bound by the weight of previous authorities' (*per* Pollock C.B., *ibid.*, p. 239): 'We ought to decide this point in conformity with a large series of decisions (*per* Martin B., *ibid.*).

[81] 9 Ex. p. 700.

said [82]: 'It appears to me very hard that where the decisions are at variance the party is to be bound by the last'. He followed the earlier case. The Divisional Courts, like other courts, have had to deal with several kinds of conflicts among the precedents.

(a) In *Broughton* v. *Whittaker* [83] a decision of a Divisional Court in the previous year was found to be in conflict with a series of three earlier decisions. The conflicting decision was not followed. Lawrence J. was able to distinguish it but he also said [84] that 'it ought not to be held by this Court as binding upon them to disregard the clear authority' of the three cases which preceded it. This remark does not make it clear whether or not the Court was strictly bound to follow the series of cases in question.

The same uncertainty in this situation exists in the Court of Appeal, as is shown by *Battersby* v. *Anglo-American Oil Co., Ltd.*,[85] in which there was 'a consistent line of authority' [86] on a certain point apart from one decision 'in conflict with the earlier cases' [87]: 'Accordingly, in conformity with the decision of the full Court of Appeal in the recent case of *Young* v. *Bristol Aeroplane Co., Ltd.*,[88] we are at liberty to disregard it, and, in our opinion, we ought to follow the earlier decisions'. This passage suggests that the series of precedents is not binding, but that the Court may choose to follow them; the word 'ought' would seem to refer to the legal content of the decisions. But when it was laid down in *Young* v. *Bristol Aeroplane Co., Ltd.*, that a conflict in the precedents is one of the exceptional cases in which the Court of Appeal is not bound by its own previous decision the Court was referring to a mere conflict between two precedents,[89] one on each side. When, however, the conflict is between one and many it seems reasonable that there should be no freedom of choice, but that the many ought to be followed. It has been observed [90] in connection with *Battersby* v. *Anglo-American Oil Co., Ltd.*, that 'if the reason on which the doctrine of the absolutely binding

[82] *Key* v. *MacKyntire* (1837), 5 Dowl. 463.
[83] [1944] K.B. 269.
[84] *Ibid.*, p. 275.
[85] [1945] K.B. 23.
[86] *Ibid.*, p. 29.
[87] *Ibid.*, p. 32, judgment of the Court *per* Lord Goddard.
[88] [1944] K.B. 718.
[89] *Ibid.*, p. 726: 'The Court is unquestionably entitled to choose between the two conflicting decisions'. 'The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow' (*ibid.*, 729).
[90] 61 L.Q.R. 119.

nature of precedents is based is the need for certainty, then there would seem to be much to be said for a rule which would make the most recent decision of the Court the binding one'. The writer seems to have in mind a simple conflict between two cases rather than the kind of conflict which in fact existed in the *Battersby Case*. A series of decisions has always carried greater authority than a single decision; at one time a series of decisions was the only strictly binding authority. An explicit ruling is necessary before the binding effect of a series can be taken as being destroyed or even impaired by the presence of a subsequent inconsistent decision. It would seem to be the duty of the court which is presented with such a conflict to restore case-law discipline rather than to give way to the recalcitrant decision.

(b) When the conflict is between two series of decisions there is more reason for the court to be allowed an unfettered choice. In the Divisional Court in *Bowker* v. *Woodroffe* [91] there were two decisions on one side and two on the other, all of them being decisions of Divisional Courts. The Court followed the two decisions which Shearman J. said [92] had 'for a long time been regarded as the leading cases'; these two were the earliest and the latest of the four. In *Ratkinsky* v. *Jacobs* [93] there were two Divisional Court decisions on each side, but also a Court of Appeal decision supporting the earlier pair. On principle, it would seem that the decision of a higher court must be followed whatever conflicting co-ordinate decisions [94] there may be in addition on the point, yet Branson J. did not hold himself bound: 'There being, then, these two lines of authorities, which, to my mind, are inconsistent, it becomes my duty to express my own opinion on the construction of the statute, and to decide for myself the point raised' [95].

(c) A conflict between a Divisional Court decision and a decision of a judge of first instance presents no difficulty to a subsequent Divisional Court. As Denman J. put it in *Tancred* v. *Delagoa Bay Ry. Co.* [96]: 'When the decision of a single judge, whether hearing demurrers or sitting at Nisi Prius without a jury, conflicts with the decision of a Divisional Court, as in these two cases, I think that we, sitting as a Divisional

[91] [1928] 1 K.B. 217, Div. Ct.
[92] *Ibid.*, p. 226.
[93] [1929] 1 K.B. 24, Div. Ct.
[94] Cp. *Kinahan & Co., Ltd.* v. *Parry*, [1910] 2 K.B. 389 (*supra*, p. 260, n. 18), and authorities cited in 'Precedent in Equity' (*cit. sup.*) p. 261.
[95] [1929] 1 K.B. pp. 25, 26.
[96] 23 Q.B.D. 239, 242.

Court, ought to follow the decision of another Divisional Court in preference to that of a single judge '.

When there is a conflict between two Divisional Court decisions there is no obligation to follow either on a subsequent occasion. In this case Lord Alverstone C.J. held [97] that precedent had no binding effect: ' We have to choose between conflicting decisions '. A few years earlier Bigham J. had exercised a similar choice.[98] The freedom of choice still exists when there is a right of appeal from the Divisional Court to the Court of Appeal. In *Davies* v. *Bristow*,[99] a county court appeal in the Divisional Court, Lush J. said [100]: ' These two cases being in my opinion irreconcilable I feel at liberty to express my own views as to the correctness of the decision in ' the later case, and he approved of the earlier one. Shearman J. said [101] because the decisions were irreconcilable, ' the result is that this Court is at liberty to form its own opinion as to the correct principles to be applied '.

If this liberty of judgment now existed in the Divisional Courts generally and not merely when there is a conflict of authority it would be in accordance with an older and, it may be thought, a sounder practice than the present one.

W. H. D. Winder.

[97] *Thompson* v. *Eccles Corp.*, [1904] 2 K.B. 1, 6, Div. Ct. (case stated).
[98] *Elliot* v. *Pilcher*, [1901] 2 K.B. 817, 822, Div. Ct. (case stated).
[99] [1920] 3 K.B. 428.
[100] *Ibid.*, p. 437.
[101] *Ibid.*, p. 440; the Court did ' not feel itself bound ' (p. 442).

AN ANACHRONISM IN THE BANKRUPTCY RULES

'I cannot help thinking' said Lord (then Sir Wilfred) Greene M.R. in *Re Muscovitch, Ex p. Muscovitch,* [1939] 1 Ch. 694, 696, 'that the language of the relevant bankruptcy rule' (rule 132 of the Bankruptcy Rules, 1915) 'is nowadays somewhat anachronistic, because it was introduced at a time when procedure was in many important respects different from what it is now. If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered.'

The rule reads as follows:—

> 132. Upon entering an appeal, a copy of the notice of appeal shall forthwith be sent by the appellant to the Registrar of the Court appealed from, who shall mark thereon the date when received and forthwith file the same with the proceedings.

At first sight this looks as commonplace a matter of routine as can well be imagined. To appreciate its less innocent implications it is necessary to bear in mind that bankruptcy jurisdiction is exercised not only by the High Court (in Bankruptcy) sitting in Carey Street behind the Royal Courts of Justice, but also by numerous county courts all over England. Whether a particular bankruptcy takes place in the High Court or in one of these county courts depends solely on where the debtor resides or carries on business. It makes no difference whether the debts are £50 or £50,000, the powers of the county court are (subject to a few limitations that rarely apply) the same within its own jurisdiction as are those of the High Court itself, and the duties of the County Court Registrar in bankruptcy matters are in many important respects the same as those of the Bankruptcy Registrars in the High Court. This anomaly is, however, of comparatively modern origin. It dates back to 1869, when by the Bankruptcy Act, 1869, the old Country District Courts of Bankruptcy (which with the London Bankruptcy Court operated directly under the Lord Chancellor) were abolished and their powers were transferred to the county courts. At the same time the old London Bankruptcy Court under its Commissioners gave way to a new London Bankruptcy Court under a Chief Judge, which Court was a

few years later absorbed in the High Court of Justice by the operation of the Judicature Acts of 1873 and 1875.

Substantially the same rule as that now under discussion was brought into force in 1870 (Bankruptcy Rules, 1870, r. 144), at a time when all the Courts of Bankruptcy were still independent of the High Court of Justice and the entry of the appeal was 'the material step' in appealing in bankruptcy matters. After the Judicature Act, 1873 had the effect of bringing the London Bankruptcy Court within the High Court of Justice, and the subsequent Rules of Court, 1875 overrode the Bankruptcy Rules where there was a conflict (*Ex p. Viney*, 4 Ch.D. 794), it was held that in the High Court the emphasis was changed and that the service of the notice of appeal and not the entry was then 'the material step' (*Ex p. Saffery*, 5 Ch.D. 365). That was in 1877, and Sir George Jessel M.R. was a party to both of the last cited authorities. This did not, however, apply to the county courts, for in 1881, Sir George Jessel himself, in dismissing an appeal in the Court of Appeal in a case that originated in a county court, on the preliminary ground that Bankruptcy Rules, 1870, r. 144 had not been complied with said (*Ex p. Lamb*, 19 Ch.D. 169, 173): 'In the present case the appellant chose to enter his appeal on the very last day. He knew that the object of entering an appeal is that the other side may be able to ascertain whether there is to be an appeal or not. He knew that when it is a country case the appeal has to be entered with the Registrar of the county court. In other words, he knew the object of the rule, that in a country case the appeal must be entered in the country as well as in London, was that the respondent might have an opportunity of searching the register in the country.'

The facts in that case were that an appeal from the county court had been duly entered on a Friday afternoon. Three hours still remained before the last possible post went out on that day. The solicitors who entered the appeal duly prepared a copy of the notice for transmission to the County Court Registrar. They did not, however, trouble to catch the last post on that Friday, but sent off the notice by the first post on the Saturday. It was not suggested that anyone was in the least prejudiced by this. But as the rule requiring the copy notice to be sent 'forthwith' had not been literally complied with, it was held that that was fatal to the right to have the appeal entertained at all.

The explanation of this strictness seems to be that under the old rule (Bankruptcy Rules, 1870, rr. 143, 144) the practice had been to deliver a copy of the notice of appeal to each respondent four days before the day on which the appellant intended to move. Thus the sending of the copy of the notice to the Registrar was the only notice that the appeal had been brought which the respondents got when the appeal was entered.

Even that difficulty was, however, overcome and the last possible reason for the rule disappeared when by rule 134 of the Bankruptcy Rules, 1886 and 1890 the procedure as to appeals in bankruptcy was regulated by the provisions of R. S. C., O.58, which required that the notice of appeal should be served directly upon all the parties to the appeal. Thus a respondent now has notice served upon him as soon as the appeal is entered, and has therefore no need to search the file at all. Indeed, Lord Greene, speaking of a delay of three days in sending the copy notice, observed: 'What prejudice can be suffered by anybody as a result of the three days, or the two complete days, being allowed to expire between the entering of the appeal and the serving of the notice I cannot myself imagine.' (*Re Muscovitch*, *supra*, at p. 697.)

In these circumstances, it is somewhat unexpected to find that the Court of Appeal have twice held that even a short and innocuous delay in sending a copy notice to the Registrar is not only a failure to comply with the rule in that it does not amount to sending it 'forthwith', but is also a defect curable neither as an irregularity nor under the powers of the Court formally to extend the time.

The first of these cases was *Re Vitoria*; *ex p. Spanish Corporation*, [1894] 1 Q.B. 259. There, owing purely to the forgetfulness of a firm of solicitors, no copy of the notice of appeal had been sent to the Registrar at all. In vain it was pressed upon the Court that this was a mere oversight by which nobody was or could be prejudiced in the existing state of the practice of the Court. It was useless for counsel to ask for the matter to be dealt with as an irregularity or for the time for complying with the rule to be extended. Bluntly Lord Halsbury (at p. 264) declared: 'I think it would be wrong to hold that the dispensing power should be exercised when all that the litigant can say is, "my solicitor made a blunder and forgot to give the notice". No good reason for

laying down such a rule has been shown to us. The limits with respect to the time in which, under the rules, acts are to be done are, no doubt, subject to certain qualifications; but the circumstances must be special in order to justify the Court in granting relief. No such special circumstances are alleged to exist in the case now before us. The thing required by the rule to be done " forthwith " has not been done up to this moment. I am, therefore, of opinion that we ought not to dispense with the obligation to comply with the rule.'

It was this decision that the Court of Appeal in 1939 followed with reluctance in *Re Muscovitch, supra.* The Court there held that neither the Bankruptcy Act, 1914, s. 147 (1) nor rule 385 of the Bankruptcy Rules, 1915 could be invoked to cure a failure to comply with rule 132.

The sub-section referred to reads as follows :—

> 147 (1) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court.

The rule in question reads :—

> 385. Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court may think fit.

Speaking in *Re Muscovitch, supra,* at p. 698 of rule 132, Lord Greene rounded off his observations on the effect of *Re Vitoria* by saying, ' This Court held that the rule means what it says and has to be complied with '. It does not, however, appear why rule 385 should not equally mean what it says. The operative words of that rule : ' Non-compliance with any of these Rules . . . shall not render any proceeding void unless the Court shall so direct . . . ' would seem to mean nothing unless they mean that the failure to comply with any rule (*e.g.*, rule 132) shall be fatal only if the Court shall so direct. *Ex hypothesi* the rule has not been complied with, though what it means is not in question. What, then, is there to take it irrevocably out of the general saving provision, let alone to reverse the proposition and render the proceeding void ?

The Court in deciding *Re Vitoria, supra*, rested its fundamental objection to curing the defect as an irregularity on section 104 (*d*) of the Bankruptcy Act, 1883, now replaced by section 108 (2) (*c*) of the Bankruptcy Act, 1914, which reads as follows:—

> 108 (2) (*c*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.

It was pointed out that this struck at the root of the matter by positively depriving the Court of jurisdiction even to entertain an appeal so long as there was a non-conformity with any of the rules. But the logical conclusion of this proposition is surely somewhat startling. It must and can only mean that the Court to which an appeal normally lies is deprived of all power of curing technical defects involving even the most insignificant failure to conform with the rules, because to do so would be to 'entertain' the appeal. Unless it means this, there seems to be no intelligible ground on which section 108 (2) (*c*) should prevent the Court from curing as a mere irregularity a deviation from the rules which *ex concessis* can have done no imaginable harm to anyone.

There, however, the matter stands; with the result that in the present state of the law, a slip in an unfamiliar and quite unimportant point of procedure in the office of a harassed solicitor may well result in the hearing on its merits of a *bona fide* appeal being denied altogether, and may cause the rules, which were designed to ensure that procedure should never defeat justice, to be turned into an instrument of injustice. An unreported case of exactly this kind recently came before a Divisional Court sitting in Bankruptcy. The notice of appeal raised a number of questions of substance, one at least of which was of considerable importance in bankruptcy law and involved moreover a very substantial sum of money. Owing to an oversight on the part of someone in the office of the appellant's solicitors, no copy of the notice of appeal was sent to the County Court Registrar. In fact all parties concerned had full knowledge of the appeal. Proper notices had been served on the various respondents, and the Registrar himself knew at a very early date that the appeal was pending, both because he had been told so personally at the time when the order to be appealed from was being drawn up, and because the Judge's notes and a copy of the written judgment were asked for expressly for the purpose

of such appeal. A few days before the appeal was to be heard, and after all the costs of preparing for it had been incurred by both sides, the appellant's solicitors were advised that the objection was to be taken that the Court had no power to entertain the appeal. By that time it was, in the existing state of the law, hopeless to attempt to remedy the defect, and there was nothing for it but to submit to the appeal being dismissed with costs.

In the cases above discussed and also in other cases it has been held that a mistake by a solicitor or by counsel as to the meaning or application of a rule or an inadvertent omission to comply with a rule does not constitute 'special circumstances' such as would entitle the Court to exercise its jurisdiction under section 109 (4) of the Bankruptcy Act, 1914 as limited by rule 386 of the Bankruptcy Rules, 1915 (see *Re Muscovitch*, *supra*, at pp. 698, 699), and no doubt there are sound reasons of public policy for so holding. At the same time it is submitted that a more satisfactory way of applying sanctions to parties on whose behalf such mistakes have been made would be by depriving them of their costs or by ordering them, in more serious cases, to pay costs that would not otherwise have fallen upon them, rather than by shutting them out altogether from rights which bear no relation at all to the default in question.

Unfortunately, in face of the above cited decisions of the Court of Appeal, there is no tribunal short of the House of Lords that has the power to alter the law as it now stands; and still more unfortunately perhaps, unless by chance the point should arise in a High Court case there is no procedure whereby it can ever be brought before the House of Lords, for in cases originating in the county courts there is no appeal, even with leave, beyond the Court of Appeal. (Bankruptcy Act, 1914, s. 108 (2) (*a*).) But the principle involved is of much wider application than the particular Bankruptcy Rule under discussion. It demonstrates the disturbing possibility that even today justice may be choked by technicalities of procedure. Meanwhile it is at least desirable to draw attention again to the words of Lord Greene with which he concluded the passage cited in the opening paragraph above: 'If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered.'

W. A. L. Raeburn.

SPARE-TIME ACTIVITIES OF EMPLOYEES

AN ECONOMIST'S COMMENT ON *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350

DR. KAHN-FREUND'S article [1] deals with three issues suggested by this most interesting case. (1) The duty of fidelity; (2) the effect of spare-time activities on the employee's work; and (3) statutory and other control of hours. They are best considered separately.

(1) THE DUTY OF FIDELITY

The case turned on this issue and this issue only, as the question of imparting confidential information, which was raised, was deliberately set aside as not being a part of the evidence.

Lord Greene stated the issue quite concisely ([1946] 1 All E.R. 350, at p. 356): 'As I see it, the Court stands in a sense between Scylla and Charybdis, because it would be most unfortunate if anything we said, or any other Court said, should place an undue restriction on the right of the workman, particularly a manual workman, to make use of his leisure for his profit. On the other hand, it would be deplorable if it were laid down that a workman could consistently with his duty to his employer, knowingly, deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business. I have endeavoured to raise the questions in the way that they appeal to me and, on the best consideration I can give to the matter, I think that the plaintiffs are *prima facie* right in this case.'

The legal duty of fidelity requires an employee not to work for a competitor where this would inflict great harm on his employer's business. There is no restriction on spare-time work if it inflicts no such harm, even if it is work for a competitor. For example, if the plaintiffs had been, not the sole manufacturers of hearing aids in this country, but one of a thousand equally small manufacturers, they would have been hard put to it to prove that their employees' action in helping to build up the 1,001st firm inflicted any substantial harm on their business.

[1] MOD.L.REV., Vol. 9, p. 145.

It is, therefore, of the essence of this case that the plaintiffs had a virtual monopoly of the market, which would be damaged by the emergence of a rival firm. Morton, L.J., makes this the first point on which his assenting judgment turns. But it is also of the essence that this monopoly depended on their having also a virtual monopoly of the special kind of skilled labour required for the manufacture of these instruments. If this had not been so the question would not have arisen. If this same kind of labour had been widely available in other industries, or if it had been unskilled labour, the plaintiffs could not have proved that they were harmed by the spare-time activities of their employees, for if these employees had not worked for the defendants, the defendants could easily have found similar labour elsewhere. To support the action there must be two monopolies: a monopoly of sale, and a monopoly of the particular type of labour, remembering that to an economist monopoly means not 100 per cent. control, but control sufficient to make possible some rigging of the market.

A hypothetical case will illustrate the point. Suppose that there is a firm engaged in merchanting trade with Abyssinia, and that it is the only such firm in this country. Suppose also that such trade must be conducted in Amharic, that there are only three typists with a knowledge of Amharic in this country, and that they are all employed by this firm, which also employs typists who do not know Amharic. None of the typists are confidential typists. Now suppose that a rival firm is started to do this trade, and that some typists of the first firm work for the second in their spare time. The decision in the *Hivac Case*, it seems to me, clearly refers only to the typists who know Amharic. The duty of fidelity does not prevent the others from working for the new firm in their spare time, because their employers would be no better off if they did not work for the rival firm, since the rivals would simply employ someone else. The decision in the *Hivac Case* is a decision that where a firm has a monopoly of which a monopoly of a special kind of labour is an essential part, the law will read into the contracts of that labour an obligation not to work for a competitor after hours.

As an economist I regret this decision. If a distinction is to be drawn between cases where there is a monopoly and

cases where there is none—and I have argued elsewhere [2] that this distinction is fundamental—then the public interest requires that the law should come down against the monopolist and not in his favour. The Court has taken the view that the damage the monopolist will suffer is the relevant consideration; the view of the economist is that the public interest is more important and that even if such a term were not implied, but expressed in writing, it should be void as being in restraint of trade.

Is it not extraordinary that the Courts should be willing to imply a limitation of spare-time activities only where it can be shown that such limitation is necessary to protect some private monopoly?

(2) THE EFFECT ON THE EMPLOYEE'S WORK

Dr. Kahn-Freund refers to the French authors Planiol and Ripert who seem to suggest that the employee should not do spare-time work because this robs him of his strength and prevents him from doing full justice to his employer's work. Here, of course, it does not matter whether the spare-time work is for a competitor, for some other industry, or on his own account; it need not even be work; on this view an employer could seek an injunction to restrain an employee from spending his evenings in night clubs, on the ground that this affected his work next day. We need not consider the point further. If an employer is dissatisfied with the quality of the work, he has all the usual remedies, and not many people would argue for an injunction to control spare-time activities on this ground.

(3) STATUTORY AND OTHER CONTROL OF HOURS

'The question arises', says Dr. Kahn-Freund, 'why it is that the law has done so little to protect the employee against the temptation of using his spare time for work instead of recreation', and he goes on to argue that it is desirable that the trade unions should perform this function. I profoundly disagree.

In the nineteenth century progressive public opinion favoured statutory and/or trade union control of hours and wages because employers were strong and workers weak. The aim was to prevent employers from using their strong bargaining position to force workers to work for longer hours

[2] Monopoly and the Law, Mod.L.Rev., Vol. 6, p. 97.

or to accept lower wages than was desirable. The 'villain' of the piece was the employer, not the employee. Employees in general, it was felt, wanted shorter hours and more wages; if an individual employee wished to work longer hours, it was up to him to do so, provided only that his action was not injurious to his own health or the public safety (hence the provisions in coal mining and road transport Acts), and also that it did not undermine the position of other employees who did not wish to work such long hours.

Now, provided that people are paid full wages for any work they do above the normal hours (and *a fortiori* if they are paid heavy overtime rates), the position of other employees who do not work above the generally agreed hours is menaced only in two cases. One is if there is not enough work to go round. Everyone will agree that if enough work cannot be provided, what there is should be shared equitably, and arrangements to this effect are common, *e.g.*, in the Lancashire cotton industry.

The other case is where the extra work done improves the worker's knowledge and efficiency, and enables him to outdistance other workers. This is the case in my profession. Some of my hardworking and ambitious colleagues work sixty hours a week and produce several articles a year, thus acquiring an immense reputation. For my part I should like to work not more than ten hours a week, and to spend the remaining hours reading novels, lying in the sun, and otherwise enjoying life while it lasts. Alas, were I to do this I should get the sack, and my job be given to a more industrious man. If only my trade union, the Association of University Teachers, could enforce a rule preventing us from doing any academic work in what ought to be our spare time, how much easier life would be! But, as a democrat, I cannot agree that trade unions should control what their members do in their spare time. Provided that there is enough work for all who want to do eight hours a day, and that any work beyond that is paid at recognised rates, a man should be free to work as long as he likes.

W. Arthur Lewis.

STATUTES

THE FAMILY ALLOWANCES ACT, 1945

THIS Act of twenty-nine sections is now in force, and any comment on it, however brief, must begin, where the debate on the third reading ended, with a tribute to the thirty odd years of work done for the cause of family allowances by the late Miss Eleanor Rathbone, M.P. (see in particular *The Disinherited Family* by E. F. Rathbone, 1927). It carries into effect the recommendations contained in paragraphs 50–59 of the White Paper on Social Insurance (Cmd. 1944, 6551) which embody, with considerable modifications, the suggestions made in paragraphs 410–425 of the Beveridge Report (Cmd. 1942, 6404).

The principal provision is for payment, out of the proceeds of general taxation and not of insurance contributions, of allowances at the flat rate of 5s. a week for every child, other than the eldest, who is under the upper limit of the school-leaving age or, as long as he is receiving full-time instruction in a school or is an apprentice, up to July 31 following his sixteenth birthday (sections 1 and 2). There is no means test, and the statute must be regarded as a milestone in the history of social reform. Nevertheless, it can only appear in its true perspective when the social insurance legislation strictly so called comes completely into force, when the school-leaving age has been raised to sixteen and when the provisions of the Education Act, 1944, are being fully carried out.

In the meantime there are some anomalies, due mainly to the piecemeal nature of English social insurance legislation to date, created by the provisions of sections 12–15 which apply the principle of 'no duplication of allowances' (Cmd. 1944, 6551, § 58). Section 12 prohibits any payment under the Act in respect of a child for whom an orphan's pension is being paid under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, with the somewhat unfortunate words that he 'shall not be treated as included in any family'; section 13 provides that, after the Act has come into force, supplementary allowances under the Workmen's Compensation Act, an increase in the weekly rate of benefits under the Unemployment Insurance Acts, or an additional allowance under the

Widows', Orphans' and Old Age Contributory Pensions Acts shall cease to be payable in respect of a child for whom a family allowance is being paid; section 14 deals mainly with the children of members of the forces, and section 15 provides for the reduction of family allowances where the claimant is entitled to outdoor relief or an unemployment allowance on the basis of a means test. The last two sections are only of temporary significance, and section 19 of the National Insurance Act deals with the apparent injustice occasioned by section 12 of this Act by providing for a guardians' allowance of 12s. a week, of which 5s. will come out of the proceeds of taxation. Many criticisms, however, have been made of section 13, but the questions involved are too controversial for comment in these pages.

Until the school-leaving age is raised to sixteen, there is the anomaly that parents who apprentice their son at the age of fourteen receive only 5s. a week, whereas, if he were to remain at school, they would indirectly get more than this because of the benefits conferred upon him in kind. The amount of these is said to justify the reduction of the 8s. weekly cash allowance suggested in the Beveridge Report (Cmd. 1942, 6404, § 425) to 5s. It is evident, however, that it may be some time before the provision of free meals, etc., can be adequately organised in all schools. Furthermore, one would like to know more about the practical administration of the Education Act, 1944, by local authorities before pronouncing an opinion on the extent to which the family allowances will operate as an inducement to parents voluntarily to keep their children at school beyond the present compulsory age. The cessation of the allowances at 16+, moreover, can only be viewed with equanimity if grants under section 81 of the Education Act, 1944, are liberally made, for the Act under discussion does nothing to remove what to many seems to be the anomaly that, whereas a rich parent is assisted by the State to keep his child at school beyond the age of sixteen because of the income tax allowance, a poor parent who is unable to receive the full benefit of this has no such assistance.

The Act is, of course, based upon the assumption that every parent should, while at work, be in a position to provide for one child who is below the earning age. A lawyer is hardly the appropriate person to comment on this in the light of current wage conditions, and he lacks the

necessary technique to enable him to forecast the effect of the Act upon wages in general, and, in view of the partial answer it affords to the argument that men have to provide for their children, on the demand for equal pay for men and women in particular. Still less can he venture an opinion as to the possible repercussions of family allowances on the birthrate. There are, however, certain matters of detail which come more specifically within the sphere of his work.

These are the provisions of sections 3 and 4, section 21 and the Schedule which deal respectively with the meaning of a 'family' for the purposes of the Act, the persons to whom the allowances are to be paid, and certain special cases. The allowances are payable 'for the benefit of the family as a whole' (section 1), but they 'belong', when the father and mother are living together, to the mother although they may be collected by either (section 4). They are, in every case, inalienable and immune from the operation of the Bankruptcy laws and of section 4 of the Debtors Act, 1869 (section 10). In the ordinary case, therefore, there is not likely to be much difficulty when the parents are together, and section 4 (3) and (4) deal with the exceptional case in which a Court of summary jurisdiction may direct, in domestic proceedings, that one of the parents is the only proper recipient of the payments. The allowances belong to a widower or widow living with and maintaining his or her children (section 3 (1) (*b*) and (*c*) and section 4). If a child is not living with its parents, they, or the survivor of them, are only entitled to the allowance if they are the principal contributors to the child's maintenance (section 3 (2) and Schedule, § 1). If the children are living with their parents or the survivor of them, but are being maintained by someone else, the conflict arising from the inclusion by section 3 in the definition of a family of children who are not the issue of but are maintained by the claimant to an allowance is resolved in favour of the parents by § 2 of the Schedule.

The application of the Act where the parents are divorced or separated may, however, lead to difficulty for, in many cases, § 3 of the Schedule leaves the question as to which parent is entitled to the allowance to be determined by agreement and, in default of this, by the Minister in his discretion. The provision would apply, for instance, where a father is paying maintenance under a Court order in respect of the children who are living with the mother. In

matrimonial cases which come before them, it might have been preferable to leave the matter to be determined by the Courts, for, in any case, they are likely to have to deal with difficult questions in relation to family allowances. Suppose, for example, that it has been determined by agreement or by the Minister that an innocent mother is to receive the family allowances, are the Divorce Registrars or the magistrates to treat them as part of her income for the purpose of determining the amount of maintenance payable by her husband in respect of the children living with her or, for that matter, of herself, for the allowances are 'for the benefit of the family as a whole'? What is to be the position if, in the case of a poor family, the husband takes the point that he should not be ordered to pay maintenance in respect of the younger children because the wife will then be entitled to family allowances under section 3 (1) (*c*) and section 3 (2) as the children are living with her? (It appears that this has already been done before one magistrate, see the *Solicitors' Journal*, July 20, 1946.) Views may well differ as to what the answers to these questions should be, but it is unfortunate that they are not provided by the Act.

Similar problems may also arise in connection with affiliation orders, for although section 21 (5) provides that an illegitimate child shall not be treated as the issue of its father, so that under § 2 of the Schedule and section 3 (1) (*c*) the mother is entitled to the allowance so long as the child is living with her, provided, of course, she has or is maintaining an elder child within the Act, the effect on the amount of the maintenance payable by the putative father is not mentioned. Where the child is not living with the mother, the family allowance goes, under § 1 of the Schedule, to the person who is making the principal contribution to its maintenance. However, the position with regard to the allowance should be readily ascertainable by the magistrates at the hearing of the application for an affiliation order and it is by no means clear that this will be so.

It may be noted that the Home Secretary in a letter to Clerks to the Justices (reported in the *Times*, August 5) has suggested that the fact that a woman is in receipt of a family allowance should not be regarded as a reason for reducing the amount of maintenance or affiliation payments to her, but that if in exceptional circumstances the allowance is being paid to the father it should be taken into account in deter-

mining what he can reasonably pay, the allowance being for the benefit of the family as a whole. This, however, is hardly a satisfactory solution of the above problems from the legal point of view.

In other respects the provisions of the Act appear to be fairly straightforward. Thus, legitimated children are treated as issue of their parents' marriage (section 21 (3)), and adopted children are to be treated as the issue of the adopter or adopters (section 21 (4)). The allowances payable in respect of such children are, therefore, governed, like those for children of parents who are not divorced or separated, by section 3, section 4 and §§ 1 and 2 of the Schedule. Stepchildren by a deceased spouse whose former marriage was determined by death are to be treated as the issue of the step-parents (section 21 (2)), so their allowances are governed by the provisions as to widowers and widows which have already been discussed. Section 11 excludes from any family for the purposes of the Act children who are detained on remand or under the care of a local authority, so no allowance is payable in these cases. Indeed, the Act is not one which is likely to come very much before the Courts, for section 5 empowers the Minister to deal with all questions as to the right to allowances, subject, where his discretion is not involved, to an appeal to referees. (Perhaps it is significant that this may involve the Minister in determining whether a man and wife shall be deemed to be living otherwise than together under section 21 (1) and so necessitate a decision as to whether there has been desertion, a somewhat novel matter for administrative ruling.) There is, however, a maximum penalty of imprisonment for three months and/or a fine of £50 for anyone who wrongfully obtains or attempts to obtain an allowance (section 9). By section 18 the consent of the Minister is required before a prosecution can be instituted, and the time limit is three months from the day certified by the Minister to be that on which, in his opinion, evidence sufficient to justify a prosecution came to his knowledge, or twelve months from the commission of the offence, whichever period last expires, another somewhat novel feature of the Act!

Three sets of regulations dealing respectively with the procedure on claiming allowances, persons entitled and references have already been made (S. R. & O., 1946, 137–139). They do not, however, call for comment, except that

it may be observed that the second of these, made under section 24, covering persons residing in the United Kingdom who are not British subjects born there, requires, in many cases, periods of residence or membership of the forces from fifty-two to 106 weeks as a condition precedent to a claim to an allowance. There may, therefore, be persons who have paid United Kingdom income tax on the basis of residence who are excluded from the benefits conferred by the Act.

As it is silent on the subject, the allowances under the Act are liable to tax. It is, therefore, something of a mathematical problem to calculate the exact extent to which an income tax payer with children is benefited. However, the anomalies occasioned by the provision of children's allowances in two different ways by two different Acts of Parliament, and by the giving by one Department of State of 5s. a week to be largely taken away by another, are matters which may be considered when, as will probably be the case within the next few years, a new family allowances Act comes to be drafted. The important point is that the principle has received legislative recognition.

RUPERT CROSS.

THE FINANCE (NO. 2) ACT, 1945, AND THE FINANCE ACT, 1946

BY these two Finance Acts, the country took its first steps towards a restoration of peace-time rates of tax. The purchase tax was abolished, or considerably reduced, for a large range of goods, mainly those concerned with the home; all income tax payers received some measure of relief while many of the lower paid groups were exempted altogether and, finally, industrial regeneration was encouraged by the reduction, and final abolition, of the Excess Profits Tax. The two Acts will now be considered in broad outline and as respects their more important provisions.

The Finance (No. 2) Act, 1945, reduced, as from April 6, 1946, the standard rate of income tax to 9s. in the pound while at the same time modifying the rates chargeable upon the first £125 of taxable income; personal allowances were restored to their pre-war level but, as a counterbalance, the Chancellor increased the rates of surtax, especially in the higher income brackets (sections 15–17). Excess Profits Tax was reduced to 60 per cent. as from January 1, 1946, while, so as to encourage the modernisation and re-equipment of business assets, provision was made for a 20 per cent. refund

of all Excess Profits Tax paid at the 100 per cent. rate. This Excess Profits Tax Post-War Refund was only to be paid where the taxpayer gave a strictly conditioned undertaking that the amount of the refund, less income tax, would be retained until it could be used in developing or re-equipping the business and provided that it was not used, either directly or indirectly, in a distribution of the profits of the concern to the proprietors thereof, which term includes shareholders (Part IV).

The provisions of the Income Tax Act, 1945, which provided for relief in respect of capital expenditure in the case of certain businesses and assets—see article at 8 Mod.L.Rev. 243—became effective as from April 6, 1946 (section 18). By section 21 important alterations were made in the law relating to the accountability of local authorities to the Crown in respect of interest paid by them; this subject is highly technical but, in brief, the benefit of the decision in *Allchin* v. *Corporation of South Shields*, [1943] A.C. 607 is made available to *all* local authorities regardless of their having the necessary 'local Act', while sub-section (2) reverses the decision in *Attorney-General* v. *L. C. C.*, [1907] A.C. 131, and allows a local authority to set off tax paid by it on properties *in its own occupation* against tax due upon interest paid. Part V of the Act makes important changes in the law relating to 'Relief from Double Taxation'. Agreements for the avoidance of double taxation may be made with other countries by Order in Council, the relief being given by way of a credit, against British income tax due, of the appropriate foreign income tax paid; one such agreement, with the U.S.A., is implemented by S. R. & O. (2/8/46) No. 1327. By section 27 (5), Finance Act, 1920, any relief in respect of double taxation within the Commonwealth had to be passed on by a company to its shareholders, even where the latter were entitled to a dividend at a *fixed* rate as in the case of preference shareholders, see *South African Breweries, Ltd.* v. *Sheldrick*, [1923] 1 K.B. 173, a decision which has often been animadverted upon as unfair to the equity shareholders. Section 52 (2) of the Act repeals section 27 (5) and provides that tax at the *full* standard rate is to be deducted from all dividends instead of, as heretofore, only the reduced rate borne by the company; in effect only preference shareholders are damnified since the credit given for foreign tax will enure to the benefit of the ordinary shareholder by increasing the

profits available for distribution. By section 57 a similar credit for foreign duties is given as regards death duties.

The Finance Act, 1946, is especially noteworthy for the repeal of the Excess Profits Tax as from January 1, 1947 (section 36); this tax has been strongly criticised as a clog on enterprise by reason of its penalisation of new businesses with no pre-war standard of profits. Elaborate provisions, contained in Part IV of the Act, deal with the terminal and rehabilitation expenses which may be deducted in the final settlement of the Excess Profits Tax, while relief, somewhat similar to that afforded on the termination of the Excess Profits Duty in 1920, is granted in respect of losses due to any fall in the value of stock after the end of 1946 (sections 38–39 and Schedules VIII and IX). The Chancellor of the Exchequer, during the debates on the Finance Bill, hinted on more than one occasion that he was considering a substitute tax on business profits in lieu of the Excess Profits Tax; in view of the obvious difficulties at which he hinted it is probable that this will be effected by a stepping up of the rate of tax—now five per cent.—of the 'Profits Tax', as the existing National Defence Contribution has been renamed (section 44).

In the field of Income Tax, the features most appreciated by the general taxpayer will be the increase in the earned income relief to one-eighth in place of one-tenth (section 24) though this is restricted to a maximum of £150, and also the commencement of the repayment of Post-War Credits—see note thereon at 5 Mod.L.Rev. 129—but this is only allowed for the first three years and as respect men over sixty-five and women over sixty (section 26). The Chancellor justified the restriction of the increase of the earned income relief by a desire to benefit the lower paid income groups although he foreshadowed an extension in the next budget; the relief is not effective until the second half of the financial year. It is clear that, if inflation is to be avoided, there could not be a *general* release of Post-War Credits, especially as the sum involved exceeds £800,000,000; the Chancellor is probably keeping such a release 'up his sleeve' so as to ensure 'full employment' when consumer goods are in ample supply but credit is short. One further loophole in 'legal evasion' of surtax is closed up by section 28 which prohibits, in certain circumstances, the deduction for the purposes of that tax, of annual sums paid under settlements; this is aimed especially

at the type of case exemplified in *Duke of Westminster* v. *Inland Revenue Commissioner* (1934), 19 Tax Cas. 490 (H.L.), where the taxpayer settles annual payments upon his employees in lieu of wages. The section also deals indirectly with the so-called ' charity ramp ' whereby a taxpayer in the higher income brackets himself contributes only a small percentage of any sums paid by him to a charity under the well-known ' seven year covenants '.

Sections 31 and 61 are unique in the history of our tax legislation for they reverse, in favour of the taxpayer, immediately prior decisions of the House of Lords against him. The practice of the Crown in rendering nugatory by legislation decisions of the highest appellate Court adverse to the Inland Revenue is well known, see in particular the Finance Act, 1940—noted at 4 Mod.L.Rev. 136—which nullified no fewer than five such decisions! Section 31 deals with the so-called ' double taxation ' of foreign dividends—see article at 9 Mod.L.Rev. 84—and restores, as respects *ordinary* dividends, the law laid down in *Gilbertson* v. *Ferguson* (1881), 7 Q.B.D. 562, which was overruled, after some sixty years, by the House of Lords in *Selection Trust, Ltd.* v. *Devitt*, [1945] 2 All E.R. 499. Section 61 reverses *retrospectively* the decision in *Pontypridd and Rhondda Joint Water Board* v. *Ostime*, [1946] 1 All E.R. 668, by enacting that sums received by a joint authority from its constituent authorities in order to meet deficits shall be deemed *never* to have been ' trading receipts ' for the purpose of the Income Tax Acts. It may be asked why the Crown should have resisted the taxpayers' claims in these cases right up to the House of Lords and then have *immediately* undone its success by legislation. The answer seems to be that it was essential that certain general principles of income taxation should be recognised as immutable, *viz.*, as regards section 31, that there is no *general rule* against ' double taxation ' implicit in the scheme of the Income Tax Acts and, as respects section 61, that the ' mutual principle ' involves the *complete* identity of both contributor and participant; once these principles were recognised as law, then there was scope for mitigation in their application to *particular* types of cases. A minor but revolutionary step is taken by section 62 which abolishes the office of assessor of income tax and land tax; this office can be traced back in an unbroken line to the Land Tax Act, 1698! The functions, such as they have been in recent years,

exercised by the assessors are now transferred to the inspector or collector of taxes.

Noteworthy alterations in the law relating to the Death Duties are also made by the 1946 Act. Estates below £2,000 in value are exempted altogether (section 46 and Schedule X) —the present limit of exemption is £300—and the power of the Inland Revenue Commissioners, under section 56, Finance (1909–10) Act, 1910, to accept property in satisfaction of the duties is extended (section 49). In his Budget speech the Chancellor undertook to set up a National Land Fund to deal with land transferred in satisfaction of death duties and other land acquired by the State; sections 48 and 50 give effect to this undertaking. The period in which gifts *inter vivos* attract liability to estate duty is extended from three to five years (section 47 and Schedule XI). The remaining provisions of the Act deal with highly technical matters hardly proper for discussion in the pages of this Review, but we may briefly note section 52 which exempts from the Stamp Duties all documents connected with schemes for the nationalisation of industry.

A. Farnsworth.

REPORTS OF COMMITTEES

First Interim Report of the Committee on Procedure in Matrimonial Causes (the Denning Committee). Cmd. 6881/46

The Denning Committee were appointed on June 26 to report on what procedural reforms are required in matrimonial causes and to recommend methods by which the existing delays might be eliminated. With a promptitude which other Committees and Royal Commissions might well emulate, they presented their first interim report only a month later, having then held five meetings, heard oral evidence from thirteen witnesses and considered a number of memoranda. The necessary order to implement their recommendations was promulgated on July 31 and came into operation on August 6 (the Matrimonial Causes (Decree Absolute) General Order, 1946, and the Matrimonial Causes (Amendment) (No. 2) Rules, 1946, S. R. & O.s, 1946, 1305/L.15 and 1304/L.14).

Their interim recommendations were two in number, of which the first was of the greatest social consequence. It was, of course, that the period between decree *nisi* and decree absolute should be reduced from six months to six weeks.

The Committee pointed out that the sole object of the delay is to enable the King's Proctor or a member of the public to show cause why the decree should not be made absolute by reason of its having been obtained by collusion or suppression of facts; it is not intended as a test of the petitioner's morality or to give an opportunity of reconciling the parties. Hence the delay can only be justified, if at all, in the comparatively few cases where investigation is required. These cases are of three categories:—

(1) Where the case is specifically referred to the King's Proctor by the Judge before he pronounces a decree *nisi*. In this case the delay fulfils no purpose because the investigation will have been carried out before decree *nisi*.

(2) Where the petitioner applies for expedition. These cases constituted a large part of the work of the King's Proctor but were often not in so great need of investigation as others, since a petitioner is unlikely to invite investigation unless his conduct bears it. Cases under this category would be reduced if the delay were also reduced, thus enabling the King's Proctor to concentrate on the third category.

(3) Cases in which after decree *nisi* a member of the public gives information to the King's Proctor or which the King's Proctor selects for investigation. It is difficult to justify holding up all genuine cases merely because of the small minority which require investigation and the Committee concluded that six weeks will give him sufficient time to select cases for investigation; he need not complete the investigation within that time but can always keep the matter open by entering an appearance in cases where he requires more time.

Hence the Committee recommended that the period should be reduced from six months to six weeks, this period being sufficiently long to enable the King's Proctor to fulfil his function but not so long as to be an undue burden on the innocent petitioner, and also being the time limited for an appeal.

This decision will give universal satisfaction. As Sir Alan Herbert has constantly pointed out, although six months may not seem a long time to an outsider, it may be an unconscionable time to parties who have already waited years. Although the public interest may demand that the ties of matrimony should not lightly be discarded, once the marriage has completely broken down and the offence of the respondent has been declared by the Court, it is obviously in the interests

of the parties, the children, the public, morality and the birth rate that the wrecked marriage should be legally dissolved as rapidly as possible and that the parties should be free to start anew. The only possible criticism of the recommendation is that which has already been made by Sir Alan Herbert, namely, that it does not go far enough and that the interval should be abolished entirely. The Committee do not reject this possibility, they reserve it for consideration in their final report since it would require legislation. On this point it may be noted that while steps are obviously required to ensure that the parties do not remarry while there is still a possibility of an appeal or intervention, this point is already covered by the regulations which forbid remarriage while there is a subsisting right of appeal (Jud. Act, 1925, s. 184 (1)).

The recommendation of the Committee is so obviously right that it draws attention once more to the unfortunate reluctance of the legal profession to introduce reforms on its own initiative. The Judicature Act, 1925, merely provided that the period of delay should be six months 'unless the Court by general or special order from time to time fixes a shorter period'. Hence the reform could have been introduced at any time by a Rule of Court and the alteration is so simple that it has, in fact, been made by an Order coming into operation within a week of the recommendation. Yet it needed the setting up of a special committee to effect a reform that every lawyer knew was required. Lawyers are accustomed to disclaim responsibility for harsh laws and to blame them on the Legisature, but this is but one example of the many simple but important reforms that the profession itself could effect by the use of a little imagination and initiative.

The question has been raised as to the effect of the new rule on applications for decree absolute by the respondent in default of action by the petitioner. The Judicature Act, 1925, s. 183 (3) (added by the Matrimonial Causes Act, 1937) provides that where the party who obtained the decree absolute does not apply to make it absolute, the other party may do so after the expiration of three months from the earliest date on which the application could have been made by the party who obtained the decree. It therefore follows that in the case of decrees *nisi* made before August 6 the application by the guilty party can now be made after three months from six weeks after decree *nisi*, or three months after August 6 if the decree *nisi* was made more than six weeks before that date.

In the case of future decrees the three months period will start to run six weeks after decree *nisi*. There has been no reduction in the period of three months and any such reduction would require legislation, but a corresponding reduction from three months to three weeks might well be considered by the Committee for their final report if this does not recommend the complete abolition of the decree absolute.

The second recommendation is of less importance, except to overworked solicitors. It is the abolition of the former practice under the Matrimonial Causes Rule 40 whereby the petitioner's solicitor had to search in a book to ensure that an appearance had not been entered in opposition to the decree being made absolute. This was a pointless waste of the time of solicitors and the Divorce Registry since the officials of the Registry had in any case to make a separate search themselves. This latter search will now suffice without solicitors being troubled at all.

The introduction of the new rules has been accompanied by the adoption of a further revision of practice by the Registry, which now issues a photostat copy of the decree absolute on the same day as it is made, thus obviating the former delay of several more days before a copy was obtainable.

We eagerly await further reports by the Committee. If they continue to tackle their problem with the speed and determination that they have already shown they will earn the thanks of the profession and the blessings of that all-too-large section of the public whose marriages have been wrecked.

L. C. B. G.

RENT CONTROL IN ENGLAND AND WALES

The attention of our readers is drawn to the Memorandum (C. 133) published under the above title by the Ministry of Health (H.M. Stationery Office, 3d. net.). Its object is expressed to be to answer some of the questions on the Rent Acts often put to the Minister—and one can sympathise with his desire to avoid questioning on this difficult topic. It only sets out briefly to summarise the various statutes and regulations and not to deal with detailed points of doubt or difficulty. In consequence it is designed for the layman rather than the lawyer, and the extent of public interest in this topic and of the demand for explanatory matter is shown by the fact that the London Stationery Office's initial stock of the memorandum was exhausted on the morning of publication.

Even to the lawyer it is a useful *aide memoire* since it contains an epitome of all the legislation under which rents are controlled —the Rent Restriction Acts, Defence Regulation 68CB, the Building Materials and Housing Act, 1945, and the Furnished Houses (Rent Control) Act, 1946—with references to the section concerned.

Perhaps its most remarkable feature is the exhortation, stressed in the preliminary summary and oft-repeated in the text, to consult a solicitor in all cases of difficulty or doubt. No one can question the wisdom of this advice (or the likelihood of difficulties and doubts) but it is somewhat pathetic that it should need such emphasis in connection with legislation primarily intended for the protection of the working classes. And what makes it more pathetic is the fact that it is beyond their means to act on the advice in the majority of cases and will remain so until the recommendations of the Rushcliffe Committee are implemented. Local authorities try to be helpful but they cannot be expected to give invariably accurate advice on this branch of the law, depending as this does on the correct interpretation of a maze of statutes obfuscated with a plethora of judicial decisions. For legal guidance the poor are dependent on such help as can be given by Poor Man's Lawyer Centres—in the few towns where these exist.

This Memorandum will be of some assistance to landlords and tenants in ascertaining their obligations and rights—but until the law is codified and consolidated and legal advice is freely available for all, the Rent Acts will remain too often a sword of Damocles hanging over the landlord rather than a shield for the tenant. In the meantime this memo. is about as good as it could be and the Ministry are to be congratulated upon it.

NOTES OF CASES

NEGOTIABLE INSTRUMENTS, ESTOPPEL, NON EST FACTUM AND FICTIONS

Wilson and Meeson v. *Pickering*, [1946] 1 K.B. 422.

In *Wilson and Meeson* v. *Pickering*, [1946] 1 K.B. 422, a partner in the plaintiff firm signed, on its behalf, a blank crossed cheque marked 'not negotiable', and handed it to a secretary with instructions to complete it in favour of the Commissioners of Inland Revenue for £2. The secretary fraudulently inserted the name of the defendant as payee, and drew the cheque for £54 4s. 0d. She then gave it to the defendant in payment of a private debt, and the cheque was duly met. The Court of Appeal held that the plaintiffs were entitled to judgment for £54 4s. 0d. because section 81 of the Bills of Exchange Act, 1882, which provides that a person who takes a crossed cheque marked 'not negotiable' shall not have a better title to it than the transferor, applies to an original payee, and because the plaintiffs were not estopped from alleging that the defendant's title to the cheque was defective.

Although this appears to be the first decision on the point, the judgments of the Master of the Rolls and Morton, L.J., do not call for comment so far as the construction of section 81 of the Act of 1882 is concerned. Morton, L.J., points out (at p. 430) that, as a rule, the drawer's object in marking a cheque 'not negotiable' is to ensure that it is not cashed by anyone except the payee. However, the conclusion that the latter is included in the wide wording of the section seems to be inevitable.

On the question of estoppel, the defendant relied on *Lloyd's Bank, Ltd.* v. *Cooke and others*, [1907] 1 K.B. 794, upon the authority of which the County Court Judge had decided in her favour. In that case, the defendant C. had been negotiating for a loan from the plaintiffs who required collateral security. The defendant S. therefore signed his name on two blank stamped pieces of paper and authorised C. to complete each of them as a promissory note for £250 payable to the plaintiff. C. fraudulently completed one of the documents as such a note for £1,000 which sum was advanced to him by the bank to whom S. was held liable

by the Court of Appeal on the basis of a common law estoppel.

As the law then stood, it had not been authoritatively decided that the payee of a bill or note is not a holder in due course (*Jones* v. *Waring and Gillow*, [1926] A.C. 670, at p. 680, may now be taken to have settled this point), but the Court of Appeal were not prepared to overrule the decision of the Divisional Court in *Herdman* v. *Wheeler*, [1902] 1 K.B. 161, that he was not. The facts of *Herdman's Case* was similar to those of *Lloyd's Bank* v. *Cooke*, but it was argued exclusively on the construction of the Bills of Exchange Act, 1882. After conferring a *prima facie* authority to complete a stamped piece of paper which is signed in blank and delivered in order that it may be converted into a bill, section 20 of this Act goes on to provide that only a holder in due course can enforce the instrument, against those who become parties prior to its completion, if it is not filled up strictly in accordance with any authority which is given. *Herdman* v. *Wheeler* was, therefore, decided in favour of the defendant.

In these circumstances, it would be surprising to find that the estoppel upheld in *Lloyd's Bank* v. *Cooke* was based on the fact that the document involved was, unlike that in *Wilson and Meeson* v. *Pickering*, a negotiable instrument, and it is submitted that this was not the ground of the decision. Collins, M.R., said ([1907] 1 K.B. at p. 802) 'at common law there is an effectual estoppel against a person who, like the defendant S., has entrusted an agent with securities for the purpose of obtaining, on the faith of them, an advance of money up to a certain amount, even though the agent uses them as a means of obtaining a larger advance'. Later (at p. 803) he doubts whether an estoppel could have been set up in *Herdman's Case*, and he could hardly have done so if that about which he was speaking was founded upon the negotiable nature of the security upon which he held the defendant liable. It seems, therefore, that *Lloyd's Bank* v. *Cooke* was decided on estoppel by representation of agency, and it was so treated by Lord Sumner in his speech in *Jones* v. *Waring and Gillow*, [1926] A.C. 670 at p. 693.

This is why it is regrettable that the primary reason given by the Court of Appeal for distinguishing *Wilson and Meeson* v. *Pickering* from *Lloyd's Bank* v. *Cooke* was that the cheque

in the former case was marked 'not negotiable'. Lord Greene, M.R., says ([1946] 1 K.B. at p. 427) 'the rule that a person who signs an instrument in blank cannot be heard as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments'. Similarly, Morton, L.J., speaking of the judgments in *Lloyd's Bank* v. *Cooke*, says (at p. 430) 'each member of the Court laid stress on the negotiable character of the document'. They did, but not, it is respectfully submitted, as part of the *ratio decidendi*. Their concern was to show that, the fact that the promissory note had not been negotiated to the plaintiff so as to make him a holder in due course within what *Herdman* v. *Wheeler* had decided to be the meaning of the Bills of Exchange Act, 1882, did not prevent an estoppel from arising. Fletcher Moulton, L.J., went further, but his *dictum* to the effect that the plaintiff must be treated as a holder in due course ([1907] 1 K.B. at p. 805) was *obiter* and no longer represents the law.

It is therefore submitted that, at any rate since the decision of the House of Lords in *Jones* v. *Waring and Gillow* (*supra*), the rights of the original payee against the drawer of a cheque, the maker of a promissory note, or the acceptor of a bill of exchange must be determined, where necessary, by the principles of the common law as to estoppel and not by the rule of the law merchant which treats these instruments as currency in the hands of a holder in due course. The latter is one to whom they have been negotiated, but the exclusion of an original payee may not have effected any change in the law on the point under discussion. For instance, Byles, J., in the passage from his judgment in *Swan* v. *The North British Australasian Co., Ltd.* (1863), 2 H. & C. 175, 184, 185, quoted by Lord Greene, M.R. ([1946] 1 K. B. at p. 427), confines his remarks as to honest acquisition conferring title to bills and notes made or become *payable to bearer*. Again, in *Foster* v. *Mackinnon* (1869), 4 C.P. 704 at p. 712, when speaking of the liability as acceptor of one who signs his name across the face of a blank stamped bill which has been improperly completed, he restricts it to cases in which the instrument has passed to an innocent *indorsee* for value. At any rate, it is now difficult to see upon what principle a different rule of estoppel can apply between

maker and payee of a promissory note and drawer and payee of a cheque marked 'not negotiable'. Each case depends upon the ordinary law of contract and agency.

The foregoing criticism does not, of course, affect the other reasons given by the Master of the Rolls, with the concurrence of Morton, L.J. (at p. 431), for holding that there was no estoppel in *Wilson and Meeson* v. *Pickering*. These were (i) that no duty was owed by the plaintiffs to the defendant, (ii) that the real cause of the receipt of money by the defendant was the secretary's forgery, and (iii) that the defendant had not acted to her prejudice on the faith of the alleged representation of the secretary's authority ([1946] 1 K.B. at pp. 425–6). All of them, however, would have applied if the cheque had been negotiable, and none of them would have applied in *Lloyd's Bank* v. *Cooke*. In that case, there was a representation of authority and a causal connection between it and the advance made by the bank, and (*per* Lord Greene, [1946] 1 K.B. at p. 425), the bank made an advance on the faith of the representation.

The fact that one reason why the results of these two cases were different was the necessity of proving prejudice in order to raise a common law estoppel in pais, upon which, it is suggested, they each fundamentally depend, indicates the importance of distinguishing this doctrine from that of the law merchant under which honest acquisition confers title. The latter is codified, so far as blank instruments are concerned, by the proviso to section 20 of the Bills of Exchange Act, 1882, and, 'to this despotic but necessary principle, the ordinary rules of the common law are made to bend' (*per* Byles, J. (1863), 2 H. & C. at p. 184). A holder in due course does not have to prove prejudice in order to succeed in an action on an improperly completed bill which has been signed and issued in blank, and he is none the less a holder in due course because he takes it in payment of a past debt.

The distinction between common law estoppel and that which may be raised by the mercantile rule that honest acquisition confers title appears to have an important bearing on the vexed question of the relevance of negligence to the plea of *non est factum*. With all respect to those who take the contrary view (*e.g.*, Cheshire & Fifoot, *Law of Contracts*, 161), the judgment of Byles, J., in *Foster* v. *Mackinnon* (1869), 4 C.P. 704, does not involve the proposition that

negligence estops a person from relying on this plea when it could otherwise be raised at common law. All that he says is that it *may* do so and the reason for his hesitancy is not far to seek. When speaking (at p. 712) of the earlier case of *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175, he says 'it has recently been decided in the Exchequer Chamber that, if a deed be delivered and a blank left therein were afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor'. In *Swan's Case*, the same learned Judge had (at pp. 185–6), like Cockburn, C.J. (at p. 190), expressed the view that the plaintiff was not negligent. The qualifications with regard to negligence in his enunciation of the principle of *non est factum* in *Foster* v. *Mackinnon* (at p. 711), were, therefore, nothing more than a precautionary measure.

Swan's Case has since been authoritatively treated as having been decided for the reasons given in the frequently quoted passage from the judgment of Blackburn, J. (4 C.P. at p. 182)—'the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake, . . . it must be the neglect of some duty that is owing to the person who is led into that belief' (see, for example, *London Joint Stock Bank* v. *Macmillan*, [1918] A.C. 777 at p. 836). As Byles, J., had said ((1863), 2 H. & C. at p. 184) 'the position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed is not his deed seems to me both novel and dangerous', it is hardly likely that he was laying down what is said to have been settled law prior to 1911 in his references to negligence in *Foster* v. *Mackinnon*, unless there is some obvious reason why negligence in relation to the signature and delivery of a complete as contrasted with a blank document should raise an estoppel.

It is submitted that the attempt to distinguish *Swan's Case* from *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489, on the ground that the former simply decided that the plaintiff was not responsible for the consequences of his broker's forgery (Cheshire & Fifoot, *op. cit.* 163) fails to take account of the fact that one ground of the decision was that no duty was owed by the plaintiff to the defendant. Similar objections apply to the attempted distinction founded on the intervening larceny of Swan's broker (XXVIII, L.Q.R. 190), and it appears that the judgment in *Foster* v. *Mackinnon*

'must be read as specifically referring, so far as it turns on negligence, to the case of a negotiable instrument' (*per* Kennedy, L.J., [1911] 1 K.B. at p. 497).

A holder in due course of such an instrument must prove that it was signed by the defendant, and, as *Foster* v. *Mackinnon* shows, he is liable to be defeated on this point by the plea of *non est factum*. However, as his claim is derived from a system of law under which honesty confers title and past consideration is good consideration, it is not surprising that an estoppel by negligence may be raised in his favour where it is not raised by the common law, founded as it is on the maxim *nemo det quod non habet* and under which detriment is essential to raise an estoppel in pais.

Bowmaker, Ltd. v. *Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113.

The effect of the common-law doctrine as to title is strikingly illustrated by the decision of the Divisional Court (Lord Goddard, C.J., Humphreys and Singleton, JJ.) in *Bowmaker, Ltd.* v. *Wycombe Motors, Ltd.*, [1946] 2 All E.R. 113. In that case, it was held that a garage proprietor was not entitled to exercise his artificer's lien, as against the owner, on a car which had been subject to a hire-purchase agreement. His contract with the hirer to effect the repairs in respect of which the lien was claimed had, presumably, been made in ignorance of the fact that the hire-purchase agreement had been determined some days previously. When it was left at the garage, the hirer 'had no right or title to the car whatsoever' (*per* Lord Goddard, C.J. at p. 114).

The agreement contained a prohibition on the creation of a lien by the hirer but that would not have been fatal to the repairer's case. 'The owner, leaving the cab in the hands of a man entitled to use it, gives him an implied authority to have it repaired with the resulting lien for repairs', and, 'if a man is put in a position which holds him out as having a certain authority, people who act on the holding out are not affected by a secret limitation of which they are ignorant' (*per* Scrutton, L.J.—*Albemarle Supply Co., Ltd.* v. *Hind & Co.*, [1928] 1 K.B. 307 at p. 317–8).

However, in the *Bowmaker Case*, the car was not, at the material time, in the hands of a man entitled to use it, and, although the precise point involved was only impliedly covered by the authorities cited, it is respectfully submitted

that the decision is clearly right. Nevertheless, it is unlikely that the conflicting principles of *nemo det quod non habet* and *possession vaut titre* have been permanently and perfectly reconciled by English law, and it will, no doubt, be suggested that the case under discussion indicates the need for legislation. Section 2 (2) of the Factors Act, 1889 was passed in order to obviate the effects of the corresponding decision with regard to a sale by a factor whose authority had been revoked (*Fuentes* v. *Montes* (1868), 4 C.P. 93), but much information would be required before an opinion could be formed as to the merits of a garage proprietor's claim to protection similar to that afforded by the above enactment to those dealing with mercantile agents.

Gillman v. *Gillman* (1946), 174 L.T. 272.

The previous excursion into the realms of *non est factum* is perhaps justified by the fact that it has recently been considered by a Divisional Court (Lord Merriman, P., and Byrne, J.,) in *Gillman* v. *Gillman* (1946), 174 L.T. 272. In that case a wife had been found by the magistrate, who held that her husband was guilty of desertion, to have signed a separation deed, which would otherwise have been fatal to her allegation, without knowing what she was doing. The husband's appeal on this point was allowed, for, as Lord Merriman, P., pointed out (at p. 273), the finding that the wife did not know what she was signing was ambiguous. He concluded that the plea of *non est factum* failed, whether the wife knew the class of document she was signing but was ignorant of its contents, or whether she was unaware of the class of document and did not seek to find it out. It may be said with respect that this conclusion is unimpeachable. On the first assumption, the case is covered by *Howatson* v. *Webb*, [1908] 1 Ch. 1, and, so far as the second is concerned, it is difficult to see how the plea of *non est factum* could prevail if the wife was unable, as she apparently was, to say what she thought she was signing. The plea must be restricted to cases of mistake as to identity, and, even where there is blindness or illiteracy, the written contract must be 'of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signed' (*Foster* v. *Mackinnon* (1869), 4 C.P. 704 at p. 711 *per* Byles, J.).

There are, however, passages in the judgment of Lord Merriman, P., which suggest that the plea of *non est factum*

can only be raised where the mistake has been occasioned by fraud, duress, blindness, illiteracy or the fact that the document in issue is in a foreign language. It is true that, in the *dictum* of Cotton, L.J., in *National Provincial Bank* v. *Jackson* (33 Ch. D. 1 at p. 10), cited by the learned President in *Gillman* v. *Gillman* (at p. 273), it is assumed that the person who signs a release while intending to execute a lease is misled by the misstatements or misrepresentations of the person procuring the execution of the deed. Nevertheless, it seems that Byles, J., contemplated the possibility of the plea in question succeeding where there was no fraud—the signature ' is invalid not merely on the ground of fraud where fraud exists, but on the ground that the mind of the signer did not accompany the signature ' (4 C.P. 711).

In practice the number of cases where *non est factum* could succeed in the absence of fraud or one of the other causes of error mentioned by Lord Merriman, P., must be few indeed, however, it is difficult to find any theoretical reason why the plea should not be available in their absence. If, for instance, in *Lewis* v. *Clay* (1898), 67 L.J.Q.B. 224, Lord William Nevill had thought the documents whose signature he procured to be what he said they were, but made an improper use of them later, the defendant would still surely not have been liable on the promissory notes. The mistake assumed is as to the identity of the documents and, fraud or no fraud, to enforce it, would be ' imposing upon the defendant a contract different from that which he entered into ' (*per* Martin, B., in *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 at p. 907). The case in which this remark was made was one of mistake as to the identity of the subject matter, but it is precisely the reason why the *non est factum* plea has been allowed in the past.

In short, the writer respectfully agrees with the statements on this subject in § 79 of Salmond and Williams on *Contracts*. It is submitted that *non est factum* can be pleaded ' even against the other party who was wholly ignorant of any such error and even against an innocent and ignorant assignee of the contract ' (at p. 213). It is also submitted that negligence is irrelevant ' except possibly in the case of negotiable instruments passing into the hands of holders in due course who are put into a favoured position by statute ' (p. 214). The qualification of the latter remark seems to be justified by the absence of any *ad hoc* authority, unless the direction for

a further inquiry as to negligence in *Foster* v. *Mackinnon* be treated as such.

In *Gillman* v. *Gillman* it was also argued that the separation deed could be ignored because undue influence on the part of the husband could be presumed. This point was disposed of by a citation by Lord Merriman, P. (at p. 273–4) from the judgment of Lord Alverstone, C.J., in *Howes* v. *Bishop*, [1909] 2 K.B. 390 (at p. 395). 'There cannot be a general rule of universal application that the rules of the Court of Equity as to confidential relationships necessarily apply to husband and wife.' In that case, however, which concerned a wife's liability on a promissory note given in respect of a debt of her husband, there had been a finding of the jury that the wife knew what she was signing and that the matter had been fully explained to her. The case of *Chaplin* v. *Bramall*, [1908] 1 K.B. 233, in which a wife was held not liable on a guarantee which had not been sufficiently explained to her was not referred to by the learned President, although, as the separation agreement before him contained an undertaking by the wife not to apply for maintenance, it might be thought to come within the earlier rather than the later decision of the Court of Appeal.

In fact *Gillman* v. *Gillman* is another indication that all is not well with the theory of our matrimonial law. In the first place, there is a conflict between the views that separation agreements are purely personal matters and that the maintenance of wives is a public concern; it was for the latter reason that the *Gillman Case* was referred back to the magistrate on the question of the husband's wilful neglect to maintain his wife. Secondly, as this case shows, it is doubtful whether the distinction between mistake as to the nature and contents of the document signed which is justifiable in commercial transactions is suitable to those between spouses. The results of applying an objective test to the question of desertion which is usually determined by subjective considerations are likely to be somewhat unrealistic.

Green v. *Green*, [1946] P. 112.

However, there are already instances of downright legal fictions in divorce, and the recent decision of Jones, J., in *Green* v. *Green*, [1946] P. 112, is a reminder that they are sanctioned, in at least one case, by statute. A wife petitioned for divorce in February, 1945, on the ground that her husband had deserted her without cause for at least three

years immediately preceding the presentation of the petition. Between 1930 and 1944, the parties had been living apart under a separation order founded on the husband's desertion for a period of two years and two months. In January, 1944, however, the non-cohabitation clause in the magistrate's order which, of course, operated to prevent the husband from being in law a deserter, was struck out on the application of the wife.

Jones, J., acted on section 6 (3) of the Matrimonial Causes Act, 1937, which provides that a period of desertion immediately preceding the institution of proceedings for a separation order shall be deemed immediately to precede the divorce petition, and decided (at p. 114) that the right course was 'to add to that period of one year which occurred immediately before the presentation of this petition, the period of two years and two months which occurred before the application for the order of 1930'. He accordingly pronounced the decree *nisi*. One may be permitted to ask how the husband can, in law, be said to have been in desertion for the year 1942–3. This is what happens when a theory of '*als ob*' is applied in legal practice!

RUPERT CROSS.

BREACH OF STATUTORY DUTY—CAUSAL CONNECTION

A PLAINTIFF who has proved the breach of a duty of care may be faced with very difficult questions of causation if his injury may, but not necessarily must, have resulted from the breach. If the plaintiff cannot prove an unquestionable connection between the breach and the injury, and if the defendant cannot prove that the injury *must* have been due to some other cause, the case resolves itself into one of the burden of proof and the party bearing it must fail. Does the fact that the plaintiff has already proved the breach of a duty of care help him to shift the burden of proof onto the defendant? In *Mist* v. *Toleman & Sons*, [1946] 1 All E.R. 139 (a case under the Factories Act, 1937) the Court of Appeal held by a majority that it might do so where the injury is caused by 'the very class of accident that the regulations are designed to prevent', but not otherwise.

It was proved that the plaintiff must have been infected with tuberculosis at least six months before he entered the defendant's factory. He had at that time an 'inherent tuberculosis' which might become active at any time due

to exertion. After a month in the factory the plaintiff's condition became active. During that month he was employed in making heels for shoes at a spindle machine which gave off dust and which was not fitted with proper exhaust appliances as required by the Act. It was proved, moreover, that the excessive dust caused the plaintiff to cough badly, and that coughing was one possible cause of his complaint becoming active. At the same time he had been leading a normal active life outside working hours, and it could not be proved that the 'flare-up' of the disease was caused by any one particular form of exertion.

The plaintiff's claim looked strong in the light of two recent cases in the Court of Appeal. In *Vyner* v. *Waldenburg Bros., Ltd.*, [1945] 2 All E.R. 547, Scott, L.J., had said (at p. 549):—

> If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts onto the employer to show that the breach was not the cause.

and he quoted the following sentence from the judgment of Goddard, L.J., in *Lee* v. *Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387 (at p. 390):—

> In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a Court should certainly not be astute to find that the breach of the regulation was not connected with the accident. . . .

The first of these quotations seems intended as a deliberate formulation of a wide rule, while the second appears to be a general statement about the application of that rule. But the Court (MacKinnon and Tucker, L.JJ., Bucknill, L.J., dissenting) took for their rule the second formula and then, by turning it round, proceeded to infer that where the regulations are designed to prevent all or any of a number of classes of accidents (*i.e.*, any injurious consequences whatever) rather than one special class (*e.g.*, the cutting of fingers on an unfenced circular saw), the burden of proving the connection between the breach of duty and the injury remains on the plaintiff. It is true that in *Vyner's Case* the injury, which was in fact from a circular saw, was exactly that contemplated by the regulations and that the Court's

judgment, had the Court so chosen, could have been limited to that class of accident. But it was not, and it is not easy to understand either how the distinction now drawn by the Court of Appeal follows from the decisions cited (both of which were in the plaintiff's favour) or, as is more important, how it can work satisfactorily as a general rule. It says, in effect, that plaintiffs like the plaintiff in this case can succeed under a regulation drafted with reference only to the exact class of injury which they have suffered, but that they must fail if it should happen that the same regulation gives a wider protection against other classes of accidents as well. So that the wider the regulation, the less protection will it give in cases like this.

One concludes, with all respect, that a rule of law has been created to deal with what should in every case remain a question of fact to be decided upon the evidence: has the plaintiff proved his injury to be a sufficiently probable result of the defendant's breach of duty as to shift the burden of proof? It may be that in most cases of breach of statutory duty the rule stated in *Vyner's Case* could be applied without injustice. At least it is preferable to a rule which makes the plaintiff's claim depend on the extraneous question whether the statute creating the duty happened also to contemplate other forms of injury. But is there any reason for special rules as to causation and the burden of proof in cases of statutory as distinct from non-statutory duty? The question is equally, has the plaintiff produced enough evidence to make out his case? Helpful as it would be if there were rules of law for reaching this often difficult decision, it is only to be reached upon the facts themselves. There may, as Tucker, L.J., in his judgment appreciated, be a breach of duty followed by an injury so remote in its possible connection that the plaintiff would have to produce further evidence, for otherwise the employer would be made an insurer against all kinds of contingencies. To this extent at any rate the principle stated by Scott, L.J., needs qualification, for the word 'could' is equivocal. The distinction which ought really to be drawn is that between a bare possibility and a sufficient probability, and that cannot be further defined in the abstract. It has a certain affinity with the distinction drawn by the Court as to 'classes of injuries', but the two are by no means the same. In his short dissenting judgment Bucknill, L.J., treated the case upon the more

natural footing, holding that the plaintiff had, upon the evidence, proved a breach of duty 'likely to cause a flare-up' of the disease, and that this made out his case.

H. W. R. Wade.

DIRECTORS—COMPENSATION UPON RETIREMENT

The Cohen Committee on Company Law Amendment (Cmd. 6659 of 1945) at p. 52 of their Report recommended that: 'It should not be lawful for any payment to be made for compensation to any director of a company by way of compensation for loss of office or as consideration for *or in connection with his retirement from office*, unless particulars with respect to the proposed payment, including the amount thereof, *have been disclosed to members of the company and the proposals have been approved by the company in general meeting.*'

Although the issue in *Associated Cement Manufacturers, Ltd.* v. *Inland Revenue Commissioners*, [1946] 1 All E.R. 68, was a purely tax question, the facts disclosed in that case, as emphasised by the trenchant irony of Lord Greene's masterly judgment, more than point the moral of the Cohen Committee's recommendation.

Two of the directors of the appellant company—S., the managing director aged sixty-nine, and C. another director aged sixty, who had both served their whole working lifetime with the company—were minded to retire in 1939. One would have thought that at their ages they had well earned their leisure but, as Lord Greene observed: 'The seriousness of the threat overhanging the prosperity of the company did not escape the vigilant eyes of the other members of the Board. The fact that these two gentlemen might in the future engage in competitive activities led to the Board . . . to secure from them restrictive covenants which should ensure that they should not enter into competition with the company.' These covenants were world-wide and, in consideration for them, the Board of the company agreed to pay the directors *upon retirement* sums totalling £30,000; if the directors died before they retired, payment was to be made to their executors. Although the ostensible consideration for the payments was the covenant not to compete, there seems but little doubt that the sums paid were clearly 'in connection with the retirement from office' of these gentlemen, to use the words of the Cohen Report.

The following extract from the judgment of Lord Greene shows how the transactions were dealt with in the accounts and thereby concealed from the shareholders, *viz*: 'In the company's accounts a rather remarkable entry appears. The accounts laid before the shareholders consisted of a profit and loss account and a balance sheet. In the profit and loss account there appears this item on the credit side: "By profit on trading after deducting management expenses, bad debts, *sundry reserves* and provision for taxation, £879,282." The words with which we are concerned are "Sundry reserves". . . . When one looks at the trading account, one finds an item entitled "Sundry Special Reserves £30,000". That £30,000 is the sum of the two amounts . . . with which we are concerned . . . . It was Voltaire (who had a certain dislike of shams) who said of the Holy Roman Empire that it was neither Holy nor Roman nor an Empire. He would perhaps have been less severe on this particular description. Although he might have quarrelled, and rightly quarrelled, with the word "sundry" and the word "reserves", he might well have agreed that the expenditure in question was "special". Apart from that possibility I cannot imagine a more inaccurate entry than this.'

Commenting upon the manner in which the accounts were submitted to the shareholders, Lord Greene said: 'It appears that the Board, no doubt from a feeling of modesty, did not expose themselves to the congratulations of the shareholders upon their important achievement.' MacKinnon, L.J., pointedly observed that, if the payment in question had been made to the executors because of the death of the director before his retirement, the Board would have been gratuitously giving away the company's moneys since there would then have been no consideration at all for the payment. It is interesting to speculate what would have been the shareholders' reactions had the recommendations of the Cohen Committee been implemented by legislation and the proposals in this case for 'compensation in connection with loss of office' been adequately put before them in general meeting.

The point at issue in this case was, of course, whether the two sums aggregating £30,000 could be deducted for the purposes of Income Tax and the National Defence Contribution. It was argued for the company that the payments were allowable as being of a 'revenue' nature in that they had mitigated the potential loss of business that might have

ensued upon the cessation of the directors' connection with the company; moreover no 'asset' could have been said to have been acquired by these payments.

The real test for 'capital expenditure' in these tax cases is the oft-approved *dictum* of Lord Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205, 213 *viz.*: 'But when an expenditure is made, not only once and for all, but also with a view to bringing into existence an asset or *an advantage for the enduring benefit of a trade*, I think there is very good reason . . . for treating such expenditure as properly attributable not to revenue *but to capital.*'

The Court of Appeal unanimously held that the appellants had obtained an 'enduring advantage' by the restrictive covenants into which the directors had entered, although the danger of competition might seem, in view of the ages of the directors, very remote for, as Lord Greene said: 'In effect the company was buying off potential competitors. . . . There was nothing temporary about this advantage. It was to last for the lives of the directors . . . the benefits acquired by the company were permanent and they were world wide.' In the result the deductions claimed were held to be not allowable.

In conclusion it should be observed that the sums in question could not rank as taxable income of the directors since it was held in *Beak* v. *Robson*, [1943] A.C. 352, that a sum payable to a director under a covenant not to compete with his company, *after he had ceased to hold office as director*, is not a 'profit of office' chargeable under Schedule E of the Income Tax Acts.

A. FARNSWORTH.

RECENT PERIODICAL LITERATURE

It is hoped, in future issues of The Modern Law Review, to print short reviews of articles in periodicals, both British and American. The present note, however, can, for reasons of space, be little more than a list.

We may mention the following, grouped according to subject-matter.

Jurisprudence. Dr. F. A. Mann: The Interpretation of Uniform Statutes, 62 L.Q.R. 278; the author suggests that statutes which give effect to international conventions should not be interpreted according to the domestic rules of interpretation of the various States concerned, but uniformly so as not to diminish the value of the conventions. Dr. Glanville L. Williams: A Lawyer's 'Alice', 9 Camb.L.J. 171; this is a delightful transposition of part of *Alice's Adventures in Wonderland* from the mathematical and philosophical into the legal key. Sigmund Timberg: Corporate Fictions, logical, social, and international implications, 46 Col.L.Rev. 533. Clyde W. Summers: The Sources and Limits of Religious Freedom, 41 Ill.L.Rev. 53. Hon. William O. Douglas: The Lasting Influence of Mr. Justice Brandeis, 19 Temple L.Q. 361. C. Sumner Lobingier: Common Roots of Law and Religion, 19 Temple L.Q. 390.

Roman Law and Legal History. Dr. David Daube: Sponsor and the History of Contract, 62 L.Q.R. 266. The question dealt with is this: does the narrow technical meaning of 'sponsor' reflect an early equally narrow meaning of 'spondere' as has been urged in support of the view that stipulation originated as suretyship? Kopel Kagan: The Nature of Ususfructus, 9 Camb.L.J. 159; the author suggests that it is not merum ius and proposes to develop the theme in a further article. S. J. Bailey: Warranties of Land in the Reign of Richard I, 9 Camb.L.J. 192. K. Kagan: The Nature of Dowry in Roman Law—Rights of Husband and Wife, 20 Tulane L.R. 557.

Constitutional Law. Watson Sellar: Government Corporations, 24 Can.B.Rev. 393, 489.

Law of Property and Revenue Law. S. J. Bailey: 'To A and His Issue'; the Law of Property Act, 1925, s. 130 (2), with a note by J. H. C. Morris, 9 Camb.L.J. 185. F. H. Newark: Public Benefit and Religious Trusts, 62 L.Q.R.

234; is it necessary to prove that a trust for the advancement of religion is, in addition, directed to the public benefit or will it be considered as a charitable trust *ipso facto*? Dr. A. Farnsworth: 'Fact' or 'Law' in Cases Stated Under the Income Tax Acts, 62 L.Q.R. 248; the author analyses the distinction between facts and law. E. H. Bodkin: Bequests to Servants, 10 Conveyancer 189; who is a servant and at what dates must he have been in service? B. J. Sims: Death Duties and Powers of Appointment, 10 Conveyancer 197. D. Heap: Planning: Three Matters Concerning Interim Development, 10 Conveyancer 202; the matters are (1) temporary consents, (2) resumption of former use of property after temporary discontinuance owing to war-time circumstances, (3) control over advertisements. L. A. Blundell: Furnished Houses (Rent Control) Act, 1946. Ruford G. Patton: Future of Trust Legislation in Latin America, 20 Tulane L.R. 542.

Family Law. Judge Harry M. Fisher: Pater Familias—a Co-operative Enterprise, 41 Ill.L.R. 27; the article contains an historical survey of the rights and duties of parents as well as a discussion of the State's activities concerning children and young people, both present and future. See also the next-mentioned article.

Law of Contract. Prof. W. J. Brockelbank: The Nature of the Promise to Marry—a Study of Comparative Law, 41 Ill.L.R. 1.

Law of Tort. Harry Nims: Damages and Accounting Procedure in Unfair Competition Cases, 31 Cornell L.Q. 431.

Mercantile Law. Dr. E. Wolff: Legality of a Provision in a Power of Attorney that it shall not be revoked by the donor's death, 62 L.Q.R. 278.

Criminal Law and Procedure and Criminology. R. M. Jackson: Moot Case on Murder and Arson, 9 Camb.L.J. 154; the report of a moot case tried at the Cambridge University Law Society. The prisoner had set fire to a building in order to claim the insurance money and a person employed on the premises was burnt to death in consequence. Is the prisoner guilty of murder? Henry Barnes: Liability for Crime, 9 Camb.L.J. 210; an analysis of the conditions of liability. Frederick J. Gaudet: The Differences Between Judges in the Granting of Sentences of Probation, 19 Temple L.Q. 471. Dr. G. P. Coon: Psychiatry for the Lawyer—Common

Psychiatric States Not Due to Psychosis, 31 Cornell L.Q. 466. G. R. Forneret: Prisons Are Outmoded, 24 Can.B.Rev. 471.

International Law. Hon. Robert O. Jackson: The Law under which Nazi Organisations are Accused of being Criminal, 19 Temple L.Q. 371. M. Vashti Burr: The New Trend in International Law, 19 Temple L.Q. 449. Charles Cheney Hyde: Protection by the United States of American-Owned Property in War-stricken Areas, 46 Col.L.R. 519.

W. A. Steiner.

REVIEWS

Interest and Usury in Catholic Theology. By the Rev. Lewis Watt, S. J. (Oxford: Catholic Social Guild. 2s. 6d.)

The author of this little book is an admitted solicitor who, many years ago, left the practice of the law, and all things else, for the more fruitful science of theology. In this essay he sets out in plain and popular language the essential elements of Catholic theology in relation to Usury. Apart from the circumstance that (as we shall see) the teaching of the theologians is, after a long interval, again being accepted by leading economists, the essay is of interest to lawyers, since these elements of Christian theology furnish the key to an understanding of the attitude of the English law in relation to Usury over a period of centuries. For, in its attitude to Usury as in other matters, the common law of England was framed and directed over a long stretch of time by men who were 'formed' in the schools of Christian philosophy and theology.[1]

For the Christian theologians, Usury is wrong in itself (*malum in se*) since it is unjust to attach to the sale of a 'fungible' thing a charge (by way of 'interest') for the *right to use* that thing, over and above the just price of the thing itself.[2]

Now money *as such* (*i.e.*, in so far as it is a means of exchange) is a fungible thing. If A lends B ten units of current coin, B pays his debt by handing back to A ten units of current coin. The right of user passes to B with the coin. It is, therefore, unjust for A to seek to charge B interest for the *right to use* a 'fungible' thing like coin.[3]

[1] Thus, Stephen Langton was for a period of some twenty years a professor of theology at the University of Paris. Patteshull and Raleigh and Bracton, who are named on the final page of Pollock and Maitland's History were in their true profession canonists and prelates of the Christian Church. Sir John Fortescue, as he who runs may read in the *De Natura Legis Naturae* and elsewhere, was not only a constitutional lawyer but an accomplished theologian. Sir Thomas More was not only the greatest advocate of his time but one who was 'thoroughly familiar with the theology of the Schoolmen'. And Christopher St. German was, on his own showing and on the testimony of Professor Vinogradoff, deeply indebted to John Gerson, Chancellor of Paris, and through Gerson to St. Thomas Aquinas.

[2] A 'fungible' thing, it is scarcely necessary to add, is a thing which is consumed in the use and therefore unproductive.

[3] In 1821 an official instruction of the Roman Church declared that Usury is against natural law and justice.

The technical arguments which underlie and explain the prohibition of Usury are set out by Aquinas in the Treatise *De Justitia*, Q. 78, Aa. 1—4.[4] Though the medieval condemnation of Usury was rejected by Calvin,[5] the traditional teaching was re-affirmed by Pope Benedict XIV in the Encyclical *Vix Pervenit* in 1745: 'The species of sin which is called Usury, and which has its roots in the contract of *mutuum*, consists in this: *solely on the ground of the mutuum*, the nature of which is to require that only so much be returned as was received, a person demands that more be returned to him than was received; and so maintains that, *solely on the ground of the mutuum*, some profit is owed to him over and above the principal.'

And in the Code of Canon Law in 1917 it is decreed: 'If a fungible thing be given to someone in such a way that it becomes his, and that later he is to return its equivalent in quantity and kind, no profit can be taken *merely by reason of this contract.*'

Merely by reason of the contract: A stipulation for legal interest is not in itself wrong if there is a just title to it extrinsic to the contract of *mutuum*. In other words, the lender may lawfully ask to be protected against the risk of the debtor not repaying his debt; or, for any damage accruing to him through parting with his money; or, for any loss of opportunity of making a justifiable profit with the money in trade.

This loss or damage accruing to the lender (technically called *lucrum cessans* or *damnum emergens*) was known as an *extrinsic* title since it arose from circumstances extrinsic to the loan which might or might not be present, and not from the bare fact of the transfer of the money. The interest allowed was thus in the words of Professor Ashley[6] 'compensation not for the loan of money but for the loss suffered by the lender in consequence of the loan'. Like Professor Ashley who, if one may judge from the preface to the second edition of his work, appears to have been converted to the medieval view of Usury, the late Lord Keynes stated in his

[4] See the admirable pocket edition of the Latin text and French translation, with notes and *renseignements techniques*, by Père Spicq, O.P. (Desclée et Cie., Paris) where the history of Usury is traced from its sources in Aristotle and in the Old and the New Testament, through the Christian Fathers, to Aquinas and the Canonists.

[5] See Tawney: *Religion and the Rise of Capitalism*, 1937, Pelican edition; Wilson, *A Discourse on Usury*, with introduction by Dr. Tawney.

[6] *English Economic History*, Vol. I, p. 398. See also, Holdsworth, *History of English Law*, vol. viii, 100-1, 112; vol. xii, 397, note (9).

General Theory of Employment (1936): 'I was brought up to believe that the attitude of the medieval church to the rate of interest was inherently absurd and that the subtle discussions aimed at distinguishing the return on money loans from the return to active investment were merely jesuitical attempts to find a practical escape from a foolish theory'; but he went on to say that he had revised his opinion and looked upon the disquisitions of the Schoolmen as aimed at a formula which would lead to keeping down the rate of interest to the advantage of 'the marginal efficiency of capital'. And Lord Keynes (according to Fr. Watt at p. 51 of his essay) urged the rehabilitation of the doctrine that the rate of interest constantly tends to rise too high 'so that a wise government is concerned to curb it by statute and custom, and even by invoking the sanctions of the moral law'.

Of the worth of this little essay by Fr. Watt, Lord Keynes has left, in a letter to a friend dated April 9, 1946, less than a fortnight before he died, this opinion: 'The little volume by Fr. Watt is in my judgment extremely well done, clear, comprehensive and short. Much the best account of a very interesting subject from the Catholic point of view that I have ever read. What quite clearly emerges from his argument and is indeed the essence of it [is] that the correct measure of interest is the loss actual or potential to the lender, and not the gain to the borrower. In other words, it is usury to extract from the borrower some amount additional to the true sacrifice of the lender which the weakness of the borrower's bargaining position or his extremity of need happens to make a feasible proposition.

'I find it interesting to put it this way because it really amounts to exactly the same thing as my theory of liquidity preference. My point there is that interest proper measures the sacrifice to the lender in giving up liquidity and duly varies according to the degree in which liquidity is surrendered. I deny accordingly what has been the orthodox economic view in recent times, namely, that it is the productivity in the hands of the borrower which is the right measure. In conditions of equilibrium, of course, the two have come into a proper relation. But that does not affect the question of what interest really is.'

RICHARD O'SULLIVAN.

INTERNATIONAL LAW: VOL. I, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS. By GEORG SCHWARZENBERGER, PH.D., DR.JUR. (London: Stevens. xliv, 645 pp. £3 net.)

'The writing of history', avers Maitland, 'is in some sort an act of religion.' The writing of international law is certainly not less so, and upon the teacher of that subject there lies a duty infinitely more compelling than the force which urges all academics into print. For him the consideration that 'that book, these articles' are the key to promotion is wholly secondary. His is the prophet's duty of bearing witness. It may indeed carry with it the traditional meed of honour (and that not always merely extra-territorial!). That his name should stand with those of Wheaton and of Westlake is fame enough for most men. To assist to 'lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations', to use the words of Whewell's charge to the professors of his foundation, is golden opportunity as well as solemn duty. To become the least of the publicists is to join the ranks of the makers of law even as it is for the newest of judges to take his seat in the Court where once Mansfield sat. Yet example can be as oppressive as it is inspiring. It is comforting to say: 'I, too, could have been a Mansfield or a Bentham in those times'. It is, indeed, fatally easy to argue thus. And perhaps this fatal ease is in part responsible for the notable fact that whole decades have now passed since the appearance in the English-speaking world of a new general treatise on international law. But repetition is not necessarily genius and new ages may need new forms. Granted that a similar though less great duty and opportunity to become authority personified exists for the teacher of municipal law—and who, remembering Blackstone, shall deny it?—comparison with the common law scene is permissible. Perhaps our age calls for specialisation rather than the general view, and to complain that there are no more general treatises is as absurd as to lament the passing of the abridgments. The parallel, however, is inexact: the *Commentaries* arose, in a subtle sense, from the ashes of Viner's *Abridgment*. Specialisation among writers on municipal law, moreover, led to no evasion of the fundamental problem—of the justification, of the *justice* as it were, of the law minutely expounded. Beside Blackstone stood Bentham to point the shortcomings of that which was commented upon. Beside the private lawyer who was all lawyer, Pollock, stood the public lawyer Dicey, and as we now know, the judge who was much more than lawyer, Holmes. But specialisation within international law has always been an evasion. Minute examination

of the rules relating to blockade or ratification, concentration upon ships or sealing wax, neither discharges the duty nor exploits the opportunity of the publicist. Yet the temptation to devote 'that book, those articles' to the particular is enormous. For the general is so very dangerous. Its exposition—that necessary act of religion—where it is not the mere ancestor-worship or supererogation of an editor or revivalism of a populariser—is so apt to be either Satanism or exhibitionist heresy. If the cry: 'Evil be thou my good', so natural in time of trouble, can be resisted, it is still difficult to avoid becoming a Father Divine. At the most no more than an act of faith seems possible. The courage of an author offering now a general treatise is to be saluted. The appearance of such a book is a notable event and the work itself may not be lightly dismissed.

Dr. Schwarzenberger, the learned author of the treatise the first volume of which is now before us, is already well known; the pious urge has always been evident in him. Never evading the fundamental problem by taking refuge in specialisation, he has at one time inclined towards revivalism (in *William Ladd*, and in *Making International Law Work*) and if he has never joined the Satanists (the capital S is as natural and as reprehensible as in the word State!), he has at least written a book (*Power Politics*) about Satanism. And now he appears as a methodist. For this latest product of his pen is declared to be no ordinary textbook of the law of nations. Its method of treatment is to construct the system from international (Vol. I) and British decisions (Vol. III), and from British state practice (Vol. II) without reliance on the books of authority.

It may be said at the outset that it is a misfortune that Volume I shall have appeared alone. This circumstance makes it peculiarly difficult to be fair to Dr. Schwarzenberger or to be helpfully critical. Assessment of the work is impossible before its completion, and its present incompleteness inevitably focusses attention upon its defects rather than its merits. A time may possibly come when international law can be written from the cases in works similar to *Williston on Contracts* or *Pollock on Torts*. But that time is clearly not yet, and a system constructed exclusively from the (international) cases, as the learned author's so far appears to be, is bound to be incomplete and lop-sided. No judgment can yet be passed as to whether the volumes still to appear will complete the picture and redress the balance. The restriction of the sources yet to be drawn upon to British practice and British decision provokes the *a priori* opinion that they will not because they cannot. This restriction, incidentally, might give ground for the unworthy suspicion that Dr. Schwarzenberger adheres to that

common heresy which sees international law as no single system but as consisting in at least two sorts: one having something to do with foreign states and one a kind of English law—the rules applied by English Courts in cases with a public foreign element. A reviewer entertaining that suspicion and considering the present volume alone might dismiss it by saying that it is a mere international case book (nothing new), that it is nicely printed (rare in these days), presumably accurate (anyone can reprint), rather expensive (not the author's fault), and to conclude his remarks by expressing or not expressing, according to taste, a doubt as to whether it was worth publishing if it could only be published at a library price, since libraries contain the original decisions, not to mention earlier collections such as that in the *Fontes Juris Gentium* series.

But to treat the courageous venture of the learned author in this cavalier fashion would be both unhelpful and unfair. Dr. Schwarzenberger means it to be more than a mere case book or reprint. It is not so much that he fails to deal with the writers, but that he deliberately does not do so. In his introduction he attacks ' positivist international lawyers ' and the ' leading positivist text-books ' for claiming to provide an alternative to natural law, and for failing to do so by not finding accepted rules in the practice of states, and by not in general achieving a comprehensive analysis of the attitudes even of their own nations; for falling into the sin of voluntarism—of selecting from state practice instances fitting into their own schemes of international law or coinciding with the presumed interests of their own countries; and for exposing the law to the attacks of the Satanists—its deniers—by turning it into a new natural law in positivist disguise, into a system without scientific basis. This is indeed a bitter attack. It would be more understandable if the Jeroboams arraigned were identified and identifiable. No matter. A man is entitled to dislike text-book writers if he will, and to reject them in favour of judgments as the sources of his system, as the learned author does. Curiously, he goes no farther than to found the intrinsic authority of judgments, even of the Permanent Court, upon ' the standing of the international lawyers of whom the Court is composed, and the lucidity and persuasiveness of their exposition ' (p. 3). It is pertinent to inquire in what connection Messrs. Hurst, Hudson, Schücking, Huber and Anzilotti, to name five judges at random, have standing save as writers? Surely a judge, unless his decisions are invested with authority, is just another individual with an opinion, just another writer.

International decisions not being as yet too numerous, the construction upon the basis of them alone of a system of international law naturally produces an unfamiliar arrangement. One may go further and say that it produces a fundamentally

unscientific arrangement and a wholly ill-balanced system. Chance alone dictates the variety of topics upon which a Court pronounces. Over an infinite period of time it will, of course, pass upon everything. Yet it is surprising how often new situations will present themselves for the Courts of this country even after some seven hundred years. But it must be freely admitted that Dr. Schwarzenberger's book is not as ill-balanced as one would have expected. This is in some measure due to his having relied also upon the decisions of the Permanent Court of Arbitration, of the Mixed Arbitral Tribunals, and even of bi-lateral arbitral tribunals. There is no reason why he should not have called in this lesser world to redress the balance of the greater. But the relative authority of these secondary decisions, not noted for ' lucidity and persuasiveness ', and of opinions of great jurists or practice of foreign ministries is eminently debateable. It would be invidious to select indifferent arbitral awards for comparison with good writers. But it would be easy. And any differentiation amongst awards would lay the selector open to the charge of voluntarism—a charge which Dr. Schwarzenberger cannot in any event escape, since he has clearly not dealt with all international decisions extant.

Since he confesses to a suspicion of foreign ministries almost as deep as that which he nourishes in regard to writers, it is surprising to find that Dr. Schwarzenberger proposes to go further in the next volume and rely for the completion of his system upon the views of one of them. But he admits that international law is more than a system of (*semble*—international) case law, and that legal opinions expressed in state practice, the views held by municipal Courts, and the treaties concluded by individual states, are ' sources which prominently represent international law in the making '. He proposes, apparently, to treat each of these sources in the same manner in which international decisions are treated in this first volume. The ultimate result would thus appear likely to be not one treatise but three, each setting forth a separate system as it appears by reference to a single source. This odd-sounding arrangement, it should be explained, is adopted in order to introduce students to the method of using each of the sources treated. It is not quite clear to this reviewer why the introductions could not have been effected simultaneously: students of English law appear to have no difficulty in grasping all the sources of that law together. Nor does this reviewer think that Dr. Schwarzenberger has sufficiently justified his reliance upon municipal decisions. And his initial rejection of writers in favour of international cases is, of course, enormously compromised by his ultimate acceptance of all other lesser sources.

It seems, however, trivial to labour objections to Dr. Schwarzenberger's method of which he must be well aware. The fact

is that he has adopted a certain manner of teaching which he has found, he tells us, ' an exciting experiment ', and he has now embarked on the experiment of writing the book—we dare not say the text-book—of the course. He calls this method the inductive method, and the advertisement to his book proclaims it to be the method familiar to Anglo-Saxon lawyers. Induction is indeed a process resorted to by the common lawyer: general rules are indeed induced from a line of particular cases. But it would be a mistake to imagine that a particular case is decided in accordance with a *particular rule*. Law is necessarily general, and that the technique of the English or American judge is both deductive and inductive is too often forgotten. Dr. Schwarzenberger naturally knows this, and it would be improper to imagine that he urges the abandonment of all deduction. But it is fair and proper to offer as criticism of him—and other writers on international law—some comments upon the use of the case-law method in their sphere. The work of the more considerable English and American specialists in recent years has made this method justly popular. But is the over-emphasis of ' private law analogies ' or the universal use of private (common) law methods wholly desirable? Does it not, in the first place, tend to obscure that the contemporary movement of law is not ' from status to contract ' but in the reverse direction? That the contrary should be the uninformed or unreflecting conclusion is natural in view of the conservatism of law schools. ' Taught law is tough law ', Dicey well knew, and the curious result is that there are still men alive who believe the constitution to be as he described it. That he qualified his original opinions in exhaustive prefaces, that Maitland pointed out the error, and that others such as Dr. Jennings have since devoted much energy to refuting him does not matter. The classical text still remains and that is often all that is remembered. The classical view of the constitution, however, is now not merely imperfect but positively misleading, and the classical view of the balance of the legal system—particularly in regard to such matters as the relative prominence of public and private law, of statute and common law, and as to the general attitude of the Courts towards statutes—is no less so. There is much to be said in favour of re-writing the whole of English law now with much greater emphasis upon public law—upon the inequality rather than the equality of men before it, and upon the restrictions it imposes rather than the liberties it confers. One example of the inadequacy of the classical view, one, incidentally, touching international law, may be given. The traditional statement of the relation between treaties and legislation is this: the Crown alone possesses the treaty-making power and Parliament alone the power to change the law. Therefore, a treaty which contem-

plates a change in the law needs legislation. But, as the Crown means the Crown as advised by the Ministry, and as the Ministry in practice commands majorities in Parliament, does it not appear from the point of view of the individual that the Ministry for the time being possesses power both to conclude treaties and to implement them by legislation? And would it not be more realistic to formulate the general rule thus, subject to the inevitable exceptions, rather than to go on treating the exception as the rule?

The case for restating the law of nations from a public law as opposed to a private law point of view seems even stronger. For the atomistic character of international society is its greatest ill. And the influence of writers being—*pace* Dr. Schwarzenberger—what it is, would not a tradition of exposition of international law as a system of a public law rather than a private law type conduce to a desirable solidarity in no small measure? Such an exposition would, it may be objected, be impossible because untenable in theory. This may well be. Yet it is not to be denied that the attribution of some situations to international rather than to municipal law has had some influence in strengthening the former system. For instance, it is a common-place of the text-books on international law that the jurisdiction of States is, in general, limited to their territory, and it is a fact that, in general, municipal Courts will not entertain actions arising out of occurrences in foreign places. But if the rules limiting the competence of Courts in this respect are examined they will be found to be municipal rather than international in origin in more than a formal sense. They will be found to depend on the principle of effectiveness rather than on that of the immunity of states. Further, even if international law is still in theory a law of co-ordinates rather than of superior and inferiors—as the principles laid down to guide the United Nations Organisation do not fail to proclaim—that is a situation which is not necessarily immutable, nor is it one which it is desirable to stress too much. Even if we may not yet write that law as public law we may at least refrain from underlining its atomistic tendencies by calling it private law, and demonstrating that characteristic of a law of co-ordinates which it enjoys in common with private law. A treaty may well look more like a contract than a statute, but there is implicit in the private law concept of a contract the existence of overriding rules regarding reality of consent, legality of object, and enforceability, unknown to international law. Further, the contractor of private law is subject to a public law system which will, by such instruments as the tax collector, the Bankruptcy Court and the Public Assistance Committee, do distributive justice between him and his fellows.

Such overriding rules and distributive institutions are as yet rudimentary in international law. That law, moreover, has developed institutions having the same end but in different forms—for the *clausula rebus sic stantibus* is of much wider scope than the doctrine of frustration. Is it, therefore, wise or expedient to call a treaty a contract? It may not be very much more apt to call it a statute. But surely the exploration of 'public law analogies' and of the beginnings of a system of distributive justice in the international sphere is the solemn duty and peculiar opportunity of the teacher of our time.

Relevant though we conceive this disquisition upon the general tendency of the case method to be, Dr. Schwarzenberger may complain that it has little to do with the contents of his book. Turning, therefore, to his text, we must say that it is 'excellently done'. That is, of course, within the comparatively narrow limits he has set himself. No real criticism can be made of his arrangement of his material. For that is classical and his Table of Contents might be that of any text-book. This is possibly surprising. Might he not have found further interest by arranging his matter under some such headings as Sources, Law of Actions, Law of Persons, Law of Things, and Obligations (with Agency as sub-heading)? That might have produced a shift of emphasis more provocative of thought than that which the arbitrary selection of sources alone does. Volume II, incidentally, may produce more surprises in the matter of emphasis than does Volume I, but its capacity so to do will be much restricted as a result of its exclusive concern with the practice of one state. Volume III, again, may do the same, though the consequences for the business of the Courts of what Lord Stowell called 'the insular situation of this country' are perhaps better known than the effects of geography upon the legal experience of the Foreign Office.

If Dr. Schwarzenberger could find it in his heart to cultivate a simpler style the general reader would, we venture to think, be assisted. Such expressions as 'the pivotal position of the right of independence in the system of international law' (p. 47), 'international protection . . . takes place' (p. 64), and 'situations obtaining between . . . parties' (p. 72), in which the books abounds, approach the obscure. But such blemishes do not altogether detract from what is at least an interesting and certainly a courageous work.

Clive Parry.

STUDIES IN POLISH AND COMPARATIVE LAW. A Symposium of Twelve Articles. With a foreword by PROFESSOR H. C. GUTTERIDGE, K.C., LL.D. (London: Stevens. 1945. viii and 274 pp. 25s. net.)

DURING the present war many distinguished lawyers from continental European countries have lived in exile in our midst. It will always be a matter for regret that conditions of life in war time made it impossible to utilise the enforced stay of so many of the leading men among contemporary civilians for an organised effort to advance the sake of comparative law in this country. All the more reason is there to welcome a stately volume, presented by the Polish Lawyers' Association in the United Kingdom and containing contributions to nearly every field of legal science.

It would be unfair to greet the appearance of so precious a gift, prepared and presented at times which made neither the research nor the publication an easy matter, by a few polite words on the valuable addition to the English literature on comparative law which this volume constitutes. It is often said that it is an odious job for a reviewer to compare the individual contributions in a volume of essays like the present. Yet such comparison is necessary and its result is, I think, in this case not without significance. In the present reviewer's opinion there is little doubt that any reader of this work must be struck by the fact that by far the most interesting, and probably also the most helpful, contributions are those which are devoted to subjects of private law. Dr. Nagorsky's article on the codification of the Polish civil law describes the work on the latest European codification, interrupted unfortunately by the outbreak of the war. One wonders when and in what conditions it will ever be resumed. The Polish Code of Obligations, the only part that was completed, shows sound workmanship and the influence of that type of continental legal technique which was inaugurated by the Swiss Civil Code of 1910—very brief sentences, an attempt at combining popularity with precision, a strong tendency to sacrifice the latter rather than the former, and the continued adoption of the traditional system of civil law inherited from the nineteenth-century German pandectist writers. German influence on the Code of Obligations appears to be stronger than Professor Capitant, whom Dr. Nagorsky quotes with approval, seems to be willing to permit. Thus, the three most important articles of the German Civil Code, *i.e.*, sections 133, 157 and 242 are repeated in articles 107, 108 and 189 of the Polish Code of Obligations, practically without alterations. Perhaps the most important innovation is the introduction of a *clausula rebus sic stantibus* into the law of contracts (article 269). Dr. Nagorsky rightly points out that

the vicissitudes of the post-war period rendered such a clause indispensable in Poland. Those countries which needed it, but did not possess it, soon procured it by a more or less tortuous interpretation of existing provisions. One wonders to which extent the present post-war period will revive the old problem again.

Any lawyer who desires to read something really startling is advised to turn to Dr. Alexandrowicz' article on 'Marriage Law in Poland'. The author had to describe a part of Polish law that has not yet been unified. A veritable jumble of different legal ideas and systems, incorporating the most divers legal ideologies, had therefore to be summarised here. The Roman Catholic and the Greek Orthodox Church, the French revolution, the Habsburg monarchy in its dual form as lord over two such different States as Austria and Hungary, and finally Imperial Germany—each of these has left its traces on one of the six different systems of law that until recently prevailed in Poland. The author has summarised all this mass of facts and conceptions with consummate skill. He has added to the interest of his unusually attractive contribution by comparative sidelights thrown upon the laws of other Eastern European countries. It is little to be wondered at that, the substantive law in Poland being as diverse as Dr. Alexandrowicz describes it, questions of the conflict of laws, did soon play a very prominent part.

Dr. Kuratowski in his admirably clear article on 'Some Principles of Conflict of Laws in Poland' has given a reliable guide through the Polish law on this topic. Its publication in this country will be welcomed by many a sorely tried practitioner faced with problems in this field. The sharp distinction between the rules of inter-provincial and the rules of international private law adopted in Poland is of great interest. English courts make no distinction between a rule of Scottish or a rule of, say, Swedish law: both are treated as 'foreign law'. Similarly, in the U.S.A., no distinction is made between inter-State and international conflicts. In Poland, on the other hand, no court can ever consider a rule of Polish law as a rule of foreign law, even though the court itself is established in a territory where the law in question does not apply. An intenser nationalism may partly explain this difference between English and Polish law. But one may well doubt whether there is not some better justification for the distinction. The problem might be worth a study in comparative jurisprudence from a deontological point of view.

Dr. Fryde's article on 'Certain Aspects of Modern Corporations' stands on that border-line of law and economics which lawyers in this country are often disinclined to enter. An

admirable amount of reading combined with a thorough knowledge not only of the law, but also of the facts and tendencies underlying it have produced a presentation of the problems that cannot fail to interest any lawyer who has learned that in this field much more is required of him than a knowledge of legislative rules and judicial precedents. Dr. Fryde makes lengthy reference to the excellent American literature on corporation problems, produced under the influence of the sociological school. One wonders how long our own text-book writers will be able to ignore the achievements of this school and feed the student on little, but an abbreviation of the Company Act, slightly embellished by abridgments of a few cases, selected with little regard to their importance for either the practice or the reform of the law. The Cohen Committee had nearly completed its task when Dr. Fryde's article was published. It is to be regretted that the distinguished author had no opportunity of giving evidence before the Committee. Though his article is devoted to stating problems rather than to solving them, one suspects that he might have had to say something on some of those aspects which in the view of a number of critics the Report of the Cohen Committee has somewhat neglected.

The present reviewer possesses no qualification for appreciating work in the field of criminal law, but Professor Glaser's short remarks on the Polish Criminal Code seem to him to be a very excellent introduction to a codification of which little has yet become known in this country. Dr. Szurlej's article on '*Nullum crimen sine lege*' deals, not with the much debated rule of *nullum crimen sine lege* which the totalitarian régimes have tried to put into the dustbin of history, but with the problem of the prosecution of war crimes. Unfortunately, political passion has more than once carried the author outside the sphere of cool and scholarly reasoning. No doubt such passion is fully excusable and perhaps even justified, but it does not increase the persuasive effect of legal arguments.

Two other contributions are not wholly free from the taint of political bias. Professor Komarnicki's concise article on the 'Spirit of Polish Constitutional Law and its Recent Development' glosses over some of the difficulties of the subject. That the Polish Government in exile worked on the basis of the Pilsudski constitution of 1935 was surely not 'necessary in order to ensure a strict legal continuity of the State'. This constitution, as Professor Komarnicki rightly states, had itself been introduced by a *coup d'état*. Legal continuity in such circumstances can hardly count for very much. The 1935 constitution proved a great obstacle in the Polish fight for liberty. Those who did most to uphold it, made strange bedfellows with many of the fighters for democracy. To-day there can be little

doubt that in the interests of Polish freedom and independence it would have been much better to scrap the 1935 constitution immediately on the collapse of the Colonels' régime, whose requirements it had been made to serve. One wonders, too, at the peculiar way in which Professor Komarnicki uses the term 'liberalism'; he considers as a 'liberal' State the Poland of the time previous to her first partition, when all citizens were equal, but when only the nobles were citizens. Dr. Moderow writing on the 'Revision of Treaties and the Interests of Peace' thinks that the German campaign for the revisibility of treaties constituted an unsettling and even a menacing factor in the development leading to the second world war. While one will readily agree with him so far, it seems less certain whether his own attitude, which rejects any revision of territorial decisions, has any chance of prevailing under present conditions. Dr. Moderow's article was probably written before the Potsdam resolution on the boundaries of Poland had been published, and certainly before criticism of that fateful decision has been able to make itself heard. To-day many Poles would welcome a peaceful revision of Poland's Eastern frontiers, while many other Europeans feel a great deal of uneasiness at the chance that no peaceful revision of her Western frontier should be possible.

Professor Grodynski's article on Polish Budget Law is, of course, of a more technical character, but illustrates happily enough the truth of Professor Komarnicki's statement that with all its many bad features Pilsudski's dictatorship was yet not on the same level with the dictatorship in Germany and Italy; the Polish Diet at least had a budget on which to vote. Dr. Poznanski has contributed a short but thoughtful study on the status of consuls in international law. He reviews the various attempts at codifying this important part of international law, and expresses the hope that the work which had been begun before the war may soon be continued. Yet, as he rightly says, it is difficult to forecast what part the consular service will play in the new world. Prophecies have too often been proved to be wrong. The much repeated desire to do away with honorary consuls, to mention one topic only, seems destined to remain unfulfilled. The smaller States have not enough man-power available to staff a large number of consulates with full-time consuls. On the other hand, the general impoverishment of Europe renders it necessary to provide at least the same number of consulates as before the war, to save those resorting to them lengthy and expensive journeys.

Dr. Bloch's essay on labour legislation and social insurance in Poland contains an appreciation of the achievements of the pre-war Polish Republic in these vital fields. The introduction gives an impressive statement of the background against which

these reforms were introduced in a country that had for so long been under the sway of the worst which the world's worst administration, that of the Czars, could do. Throughout, the author shows how pre-war Poland realised the standards laid down in international conventions on the law of labour years before the international conventions were signed. The fact is certainly correct. But it is, of course, also correct that some of the conventions were concluded a little *post festum*.

It remains to speak of Professor Jarra's study on Andrew Wolan, a Polish Calvinist writer, pamphleteer and *homme de lettres*, of the sixteenth century. Professor Jarra calls him a philosopher of law. After having read Professor Jarra's statement of Wolan's views, I feel some doubt whether Wolan really deserves this epithet. He had his views on people, State and law, but they are scattered over many works and pamphlets devoted to quite different topics, and there is a great deal that was taken over second-hand from others, especially from the great classical writers. But with this proviso one cannot help feeling that Professor Jarra has opened the door for readers of English legal literature to a field of intellectual activity of which very little had been known to them so far. In Wolan a character has been portrayed who, though interesting in himself by the combination in one person of the vocations of judge, statesman and religious leader, gains in importance and significance in consequence of the times in which he lived. Combining the humanistic learning of the Western European scholars with the intensity and devotion so characteristic of his people, Woland was able to think and write on many topics in the course of a long and full life, and to make his views fit squarely into his own passionately defended ideology.

Those who have collaborated in producing this volume must be congratulated on having been able to offer their readers so much and so diverse a fare. This diversity is not the least attractive feature of this book. It is a book which is capable not only of being looked up when necessity makes it imperative to search for information, but of being read by those who feel that there is no harm in widening one's outlook on 'law and life'. It is hoped that in at least some of their readers the authors will have stimulated interest in the science of comparative law and in Polish law, for whose future such magnificent and tragic sacrifices have had to be brought in the course of this war.

E. J. Cohn.

Studying Law. Selections from the writings of Albert J. Beveridge, John Maxcy Zane, Munroe Smith, Roscoe Pound, Arthur L. Goodhart, Eugene Wambaugh, John H. Wigmore, Charles B. Stephens. Edited by Arthur T. Vanderbilt. (New York: Washington Square Publishing Corporation. 1945. viii and 753 pp. $4.75.)

According to the publisher this handsome volume is designed for 'returning veterans interested in the law, college students who are contemplating the study of law, first-year law students who wish to gain a general view of the field of law . . . and the general reader'. As its title-page indicates, it is not an original work but a selection of writings which may be inspiring, informative or otherwise helpful to the young student of the common law. It opens with twenty pages of inspiration, of the highest moral tone ('The Young Lawyer' by Albert J. Beveridge), from which we cull a few maxims: 'Your greatest reward is not your fee but the doing of a perfect piece of work', 'Think daily of the nobility and dignity of your profession', 'Never be ponderous, never be florid; at the same time never be dry. Be clear, be pointed, be luminous', 'Do not use intoxicants; even beware of coffee'. Rigorous precepts, but perhaps worth enunciating if by zealous adherence to them the student may attain the enviable condition of the practitioner described on pp. 31–2 as being 'as lithe as a panther, sharp as a serpent's tooth, as lucid as the atmosphere on a cloudless day and yet as suggestive as a hickory wood fire in the old home fireplace on a wintry night'. But the cynic may be reminded of the Forensic Fable of 'The Great Lawyer who told his Audience How to Do It'. The volume ends with two extracts from reports prepared for the American Bar Association. One, by the editor, on 'Prelegal Education', may be useful to the teacher for the views it quotes from various distinguished men, but it seems too wide in scope for the average student; indeed, the writer has to admit, after discussing the respective merits of a training in English, social sciences, history ancient and modern, mathematics, Latin, accounting, logic, scientific method, psychology, philosophy, physics, chemistry, biology, that the future lawyer will doubtless find that 'he cannot master every study recommended'. And the cynic may recall the Fable of 'The Proud Parent Who Did His Best for Alfred'. The other, by Charles B. Stephens on 'Finding Your Place in the Legal Profession', discusses briefly and helpfully, in the light of American conditions, the advantages and disadvantages of general and specialised practice, of individual practice and partnership work, of large and small town practice, of private practice as against Government

employment or work in the legal department of a business firm, and so on.

In between comes more solid fare. It is unnecessary and would be presumptuous to attempt here any fresh criticism of such familiar and authoritative writings as Zane on 'Five Ages of the Bench and Bar of England' (reprinted from *Select Essays in Anglo-American Legal History*) or Goodhart on 'Ratio Decidendi' (from *Essays in Jurisprudence*). And it is sufficient merely to mention Pound on 'An Introduction to American Law' (an outline course of lectures prepared for the Trade Union College of Boston and specially revised by the author for this volume), on 'A Survey of Social Interests' (from *Harvard Law Review*, 1943) and on 'Interpretation of Statutes' (a reprint of Pound's Introduction to Sloovere's *Cases on the Interpretation of Statutes*), Wambaugh on 'How to Use Decisions and Statutes' (from Cooley on *Brief Making*), and Wigmore on 'Jury Trial Rules of Evidence' (from *A Century of Progress*, 1835—1935); although the actual texts of these writings may not be so easily accessible on this side of the Atlantic, the names of the writers are sufficient indication of the lines that they follow and sufficient guarantee of their authority. But Munroe Smith's 'Elements of Law'—a long section of over 200 pages—calls for a word of comment, as the author's name is not so well known here and, except for the introductory chapter on Jurisprudence, the whole section consists of hitherto unpublished material made up by the editor from his class-room notes of Munroe Smith's lectures at Columbia Law School. What a good teacher Munroe Smith must have been! There is perhaps little that is 'original' in his thought on Jurisprudence, but the simplicity and lucidity of his treatment must awaken the despairing admiration of any teacher who has grappled with the task of introducing students to the fundamental questions of theory which lie beneath the structure of practical law. Following the chapter on Jurisprudence comes a history of legal systems such as one could wish to see included in the first year programme of every law school. It covers Ancient Law, Mediaeval and Feudal Law, Canon Law, City Law and the Law Merchant, the Reception of Roman Law, the development of the various European systems and the progress of Codification, and then turns to the history of Common Law and of Equity. There is a suggestive, though brief, chapter on the influence of Roman Law on English Law, in which is mentioned (alas, no more than mentioned) something that is easily overlooked in histories of private law, namely, the reciprocal influence of English constitutional and criminal law on the public law of Continental systems. There are chapters on the world-wide

diffusion of European law, on the sources of American law and on Codification in the United States. These latter chapters contain much that will be interesting not merely to the undergraduate student and his teacher, especially concerning the reception of European law (Spanish, Dutch, French and English) in the various States of the Union. But in all his chapters Munroe Smith displays the same virtues of exposition, painting in broad outline but always clearly, vividly, and with a sense of proportion. The only matter of regret is that the editor did not have his text more carefully checked. There are too many small slips, especially in the spelling of Latin words, which may be pardonable in a student's notebook but which should have been corrected before publication. And the statement on p. 224 to the effect that Augustus gave the *ius respondendi* to certain of the 'judges' should perhaps be altered or annotated; on reading the page carefully it seems that Munroe Smith regarded the *peritus* as the real judge, distinguishing him from the *iudex*, but the student who copies his words as printed may well suffer in an examination.

What are we to say of *Studying Law* as a whole? The method of compilation necessarily involves a good deal of repetition, for instance, the history of the common law is recounted by Zane and by Pound and by Munroe Smith. But there is no harm in this; indeed, the student may benefit from being able to compare the treatment of the same subject by different masters. Some of it, for instance Goodhart on 'Ratio Decidendi', is too advanced for the utter beginner. But there is much which the good student could read with interest at an early stage in his career and much which could be profitably read and re-read at intervals even after the lawyer has left the law school for professional life. It would make an excellent gift for the prize-winners in a first year class.

To the juristic philosopher it presents some interest as a document illustrative, both in what is explicitly said and in what is taken for granted, of the American outlook on legal problems, a characteristic combination of sociological method with individualistic principles. Law, as one gathers especially from the extracts from Pound and from Munroe Smith, is to be considered not as a system of abstract rules but as a set of practical operations affecting social life. In this the socialist and the communist would agree. But to these American writers the social life which is good and which law should promote is one based on private property, individual enterprise and, within limits, free competition. The activity of the individual must often be checked in the interest of the general security or well-being, but there is a social interest in individual freedom and in 'individual self-assertion' which

must equally be maintained. There is little, if any, indication that other theories, denying private property and individual economic enterprise or denying altogether the value of the individual in himself, can be and have been held. It might be good for the American student at least to be told of the existence of such theories.

A. H. Campbell.

Cases on the Law of Contract. By G. C. Cheshire, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Vinerian Professor of English Law in the University of Oxford, Fellow of All Souls College, Oxford, and C. H. S. Fifoot, M.A., Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law. (London: Butterworth & Co. (Publishers), Ltd. 1946. xxiv and 432 pp. 30s. net.)

The appearance of a new book of cases presents the opportunity for a brief investigation of the rôle of the case-book in legal education.

The idea of a collection of cases is not novel (Smith's *Leading Cases*, for instance, was first published in 1837) though it was only in the later nineteenth century that the case-book came into common use. These books were bulky, costly and contained a vast amount of commentary; they reproduced the judgments in their entirety, and the statement of facts and counsel's arguments at great length.

There soon appeared, however, a new type of case-book, wherein the facts of the cases were set out simply and succinctly and the important parts only of the judgments were transcribed. In these books the commentary was drastically reduced: in some to short explanatory supplements, and in others to a mere citation of further cases.

Now, though there are examples of case-books designed to meet the requirements of the practitioner (or even the teacher) yet most of them are written primarily for the student. It would appear clear, despite the professed hope of several writers, that no one book can satisfactorily meet the needs of these two classes. This is because: firstly, the practitioner calls for a complete and exact reproduction of the whole case, whereas the student desires some abridgment; and secondly, the scope and character of the commentary demanded by the practitioner is wholly unsuitable for the student. (It is an exceptional student who can make more than a superficial use of the exposition contained in a book such as *Cases on Equity* by Chafee & Simpson.)

Be that as it may, what is being discussed here is the case-book written for the student.

Before considering the controversial question of abridgment, it is necessary to make some answer to those who maintain that the student should make straight for the Reports because there is no place for 'potted law'. Apart from the advantages of possessing some collection of cases for use when the Reports are temporarily or permanently inaccessible, the time saved and the clear guide afforded by the case-book more than justifies its existence. 'The student, when he . . . attempts to follow this advice [*viz.*, that 'he ought early to habituate himself to the perusal of Reports at large, instead of pinning his faith upon the commentaries and abridgments of the treatise writers']. . . . finds himself astray amid the accumulated lore which the Reports present to him . . . ; he feels his judgment perplexed, his choice distracted, and his immediate wish is, that some guide would direct him to the *leading* cases. . . .' Thus writes Smith in 1837, and what he says is as true now as it was then. But conservation of time is the more compelling reason. This is brought out vividly by Dr. Glanville Williams in his *Learning the Law*. He shows that the university student has but four to eight weeks for each subject; and he states that 'into this alarmingly short space he must fit attendance at lectures, the reading of the textbook, wider reading in the library, and revision, as well as the manifold activities that properly occupy the undergraduate outside his work'. He continues: 'Those reading for professional examinations, particularly those engaged in office work during the day, will have less rather than more time than undergraduates.' (2nd ed. at p. 36.)

Is it necessary or even advisable to abridge the judgment? This is the question that now presents itself, and is one that has given rise to much difference of opinion. There are, of course, infinite degrees of abridgment (for this depends on the predilection of the particular writer) but for present purposes the case-books may be placed into two main categories: firstly, where the judgment is transcribed in its entirety; and secondly, where only that portion of the judgment containing the *ratio decidendi* is reproduced.

Professor Cheshire and Mr. Fifoot favour the former method, though they would appear to admit that the omission of that part of a judgment which deals with a subsidiary point is occasionally permissible (pp. 121, 315). They state in the Preface: 'We had no hesitation' in adopting this method, which 'while superficially less alluring . . . [is yet] . . . at once more scholarly and more practical'. The reason they adduce in support of this

choice is that the student, 'if he is to be more than a mere mechanic, cannot be introduced too soon to his original sources. By following the Judge's mind from the start to the finish of a case, he will not only accustom himself to the "flow" of English law, but will learn to search for the *ratio decidendi* and begin to practise the art of distinction'.

A faulty premise underlies this assumption, however, and this is clearly demonstrated by Mr. H. J. S. Jenkins: 'Granted that students should be encouraged to read judgments *in extenso*. But it by no means follows that such encouragement is likely to emerge from a case-book based upon this theory: the weak student is liable to be discouraged by the unhelpful totality of the unabridged judgments, [it is submitted that this applies with equal force to the average student] whereas the able student can quickly exhaust the relatively few judgments that such a case-book normally provides. The *non sequitur* seems so clear that one may be tempted to wonder cynically whether the real beneficiaries of this theory are the authors or editors themselves, for whom the self-imposed rule provides ready-made exemption from the perilous labour of abridging judgments.' (Preface to Cockle & Hibbert *Cases on the Common Law*.) After all, to give a homely if extreme analogy, one would look askance at the mother who presents her young child with logarithm tables instead of the more familiar abacus when he is learning to count. In short, except in the case of the exceptional student, the judgment-in-full case-book is of but limited value.

A case-book which adopts the abridged-judgment method, on the other hand, has much in its favour. Firstly, it can if properly used be of great assistance in teaching the student the technique of case-law, for 'one of the most valuable uses to which such a case-book can be put is to compare the extract of the judgment with the original'. (Sweet & Maxwell, *Guide to the Legal Profession*, Sect. II, p. 9.) The student is thus encouraged to refer to the Reports, and he will find when he comes to cases which are not included in the case-book that he is able to find and extract the *ratio decidendi* with ever-increasing facility. Secondly, it will enable him to save much time—a precious commodity, as Dr. Williams has shown. The student simply cannot spare the time either to make his own notebook of cases (though such a course would undoubtedly be beneficial) or to read through the whole of the statement of facts and the whole of the judgment in each case cited. Thirdly, it contains many more cases than a judgment-in-full case-book of like size. Professor Cheshire and Mr. Fifoot, for instance, have been able to

include but seventy-eight cases in a volume of over four hundred pages. Fourthly, it is particularly useful in the lecture room. As Caporn puts it: 'A lecturer can explain and illustrate principles by reference to decided cases so much more successfully if the student has before him the essential facts and extracts from the judgment bearing upon the point.' (*Selected Cases Illustrating the Law of Contracts.*) Lastly, it is invaluable for the purpose of revision.

But the peculiar advantage of the abridged-judgment method is that it puts case-law in its proper perspective. The judgment-in-full method, on the other hand, tends to obscure the true position, which is that the study of cases is a means to an end and not an end in itself. 'Law, considered as a science,' says Langdell, 'consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through the centuries.' The student, if he is to emerge from his legal training as a true lawyer, must have a firm grasp of these doctrines: he must acquire 'such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs. . . .' (*Cases on Contracts.*) If the student is to gain this mastery, he must not allow case-law to assume undue prominence: he must bear in mind always that cases are illustrative merely of the fundamental principles of law. If this premise be true, then in general it is not essential for the student to read the whole judgment.

The next question, that of the statement of facts, though closely connected with the above is in fact quite distinct therefrom.

It would appear—from a hurried glance at a number of case-books—that those writers who adopt the judgment-in-full method present also the facts in full. Why this should be so is not quite clear. It is submitted that the student is best served by a simplified and concise summary of the essential facts. Professor Cheshire and Mr. Fifoot, however, set out all the facts at length, on the ground (apparently) that the student will thereby discover 'the difference between answering academic questions framed upon nicely tabulated sets of facts and himself seeking the essential features of a long and complicated transaction'. And with this latter end in view, they have included in their book 'a few cases where the solution is seen to depend, not so much on the formulation of general principle, as on the marshalling of events'.

Now, it cannot be denied that it is essential for the practitioner to be able to pick out what is important in the statement of facts; but the student is primarily if not

solely concerned with legal principles. Surely, then, this ability is one which he must acquire when in practice? The student must strive for a thorough mastery of principle, and this task is made infinitely more difficult if he is presented with a long and complicated transaction with no indication whatsoever as to which of the facts are important. Take, for example, the case of *Hirachand Punamchand* v. *Temple* (p. 46). All the student need know, if he is to grasp the principle involved, is: the indebtedness of A to B; the offer by C to B of a lesser sum 'in full settlement'; and B's acceptance by conduct of this offer. (In order to vivify the case for the student, thereby impressing it on his memory, a few additional facts may well be given: *e.g.*, B is a money-lender carrying on business in India; C is A's father, etc.) But in the case-book the facts run to two pages, two-thirds of which is taken up by the contents of seven different letters. In many of the cases—see *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (p. 298); *Howatson* v. *Webb* (p. 119)—the statements of facts are so formidable as hopelessly to confuse or even frighten-off the most assiduous of students. (In which case, it may be added, the *Case-book* may indirectly fulfil its avowed object of 'introducing' the student to his 'original sources'; for he is likely to go in despair to the Reports, if only for the purpose of procuring the *précis* of facts from the head-note!)

More particularly, the arguments already raised in support of the abridged-judgment method can be applied here. Thus the student is not likely to pick on some trivial fact as the operative one if he is presented with a short statement of the essential facts; nor will he squander precious time in an attempt to unravel an involved situation. Moreover, a case-book that sets out the facts in full can be of but limited value in the lecture room or for the purpose of revision. The conclusion is inescapable: the presentation of the facts in full is of as little assistance to the student as the transcription of the judgment in its entirety.

In fairness to professor Cheshire and Mr. Fifoot, however, it must be pointed out that in their textbook there are to be found excellent summaries of the facts of many cases; and that in their case-book they state expressly: 'The present volume is designed primarily to accompany our book on the Law of Contract.' This being so, it might be argued that the case-book is the proper place to set out the facts in full. But if the main contention put forward above be accepted, this argument falls to the ground, and the presentation of the full facts in the case-book involves so much waste of paper. In any event, a number of cases which appear in

their case-book are not discussed at all in the textbook, but are given there as footnote references only. (See, for instance, *Percival, Ltd.* v. *L. C. C. Asylums and Mental Deficiency Committee* (p. 27); *Ellis* v. *Torrington* (p. 339).)

In conclusion, a word on some specific aspects of this case-book :—

1. The statement of legal principle at the head of each case is admirable both as to scope and content, and should be of great assistance to the student.

2. The book gives a fair if somewhat limited picture of the Law of Contract. As to the cases selected, this of course is a personal matter (the writer frequently having in mind his own textbook or course of lectures). No point will be taken here, for law teachers are not always in agreement on this question.

3. The inclusion in the second edition of the following three features would, it is felt, enhance the usefulness of this book :—

(a) supplementary notes of an explanatory nature. These should be short, for the case-book should not encroach on the province of the textbook;

(b) a brief résumé of the dissenting judgment, if there be one;

(c) a glossary of technical terms. This should include such expressions as: 'postea'; 'non-suit'; 'demurrer'; etc. (pp. 409, 252, 35).

J. D. Hayman.

The Effect of War on Contracts. By George J. Webber, ll.d. Second Edition by the author. (London: The Solicitors' Law Stationery Society, Ltd. 1946. lxviii, and 802 pp. (with index). £3 17s. 6d. net.)

I discussed the first edition of this book at some length in 4 Mod. L. R. 233 and I do not propose to go over the ground again. Dr. Webber has provided a painstaking and erudite new edition, in the course of which he has added over 200 pages of new matter. My impression is that the book is now overweighted, and the price has certainly gone to a point at which most practitioners will jib. Dr. Webber himself states that the new edition is three times as large as the first—'one third of the book is entirely new: a new presentation of matters, old and new. Of the rest vast portions have been augmented, or recast, or entirely rewritten'. I do not have the impression of quite such a complete reconstruction, but certainly the book has been more thoroughly overhauled than is usual with a second edition.

There are two new chapters in Part I: of these that on 'War: Duration and Termination' contains a little of the old material, and provides a useful prologue, since the original work started rather abruptly. There follows a lengthy chapter on 'Emergency Powers: Effect on Contracts': for Dr. Webber fears that these or their effects will long be with us. The remainder of Part I has not been radically touched.

Part II which deals with the effect of war on various specialised branches of contract, most of which are naturally of the commercial variety, has been substantially expanded under two heads, *viz.*, Insurance of Property and Contract of Service. A great deal of the chapter on Insurance is concerned with highly technical matters of marine insurance and particularly the long and somewhat conflicting line of cases dealing with 'warlike operations'. The wisdom of treating such matters at great length in a general work seems to me highly questionable, though I have no fault to find with Dr. Webber's treatment of the topic. Under Contract of Service the expansion is justifiable since we are here confronted with the Essential Work Order and the Reinstatement in Civil Employment Act, 1944, which give rise to serious difficulties and Dr. Webber's treatment of which will be found helpful.

Frustration of Contract which is the core of the book is now considered in two parts, the one on Frustration and the other on its Effects. The gusto with which Dr. Webber attacked the difficult problems involved in this topic in the first edition tends to become fanatical prolixity. He was, and remains, a convinced adherent of what may be called the Haldane-Wright view of frustration. It seems to me that the *Constantine Case*, [1942] A.C. 154 authoritatively placed the doctrine of frustration upon the basis of 'the presumed common intention of the parties'. Dr. Webber struggles hard against this view of the matter and advances a forcible argument in support of his case. Unfortunately his enthusiasm somewhat detracts from his lucidity, and while his chapters will undoubtedly be read with great interest by all who are reasonably conversant with the subject I am afraid that the result for others will be confusion.

In these parts Dr. Webber has a new chapter on 'No Frustration of Contract' which is nearly fifty pages long. The scientific treatment of the subject does not really lend itself to a division on the lines of contracts which are and are not frustrated because the result depends on the supervening circumstances, indeed the chapter division is quite unrealistic. Again he has new chapters on the *Fibrosa Case*, on Quasi Contract, and on the legislative intervention which led up to the Law Reform (Frustrated Contracts) Act, 1943, of which

he gives an excellent detailed discussion which can be profitably compared with the monograph by Dr. Glanville Williams.

The number of Appendices has also been very much expanded. Most of these have been called for by the developing circumstances of the late war, but it is a little difficult to see the reason for one on Recent Insurance Cases which one would have expected to find dealt with in the body of the book. Why should the case of the *Atheltemplar* (1945), 61 T.L.R. 454 be dealt with here, and the similar case of the *Coxwold*, [1942] A.C. 691 in the text?—a number of these cases are decisions of U.S. Courts.

CHORLEY.

LAW AND PRACTICE OF DIVORCE AND MATRIMONIAL CAUSES. By D. TOLSTOY, Barrister-at-Law. (London: Sweet and Maxwell, Ltd. 1946. xxxv and 386 pp. 30s. net.)

THIS book is intended to serve the purposes of the practitioner who wants a short work of reference and the student who is taking this subject in the Solicitors' Finals Examination. Although doubtful points are raised and answered in an interesting way, it is mainly uncritical. In view of his avowed objects, however, the author cannot be taken to task for this and is to be congratulated on a remarkably accurate piece of work.

Chapters I and II dealing with the Courts and Jurisdiction are somewhat concise, and it should be made plain on p. 2, as it is on p. 231, that the powers of district registrars on applications for ancillary relief are limited. Moreover, in Chapter II, the important practical point is omitted that, if the principal decree of a foreign Court is not recognised by the English Courts, ancillary orders such as those for maintenance will also not be recognised (*Simons* v. *Simons*, [1939] 1 K.B. 490).

Chapters III, IV, V and VI dealing respectively with Dissolution, Judicial Separation, Restitution of Conjugal Rights and Nullity contain an admirable summary of the law down to August 1, 1945. From the practical point of view, however, the possibility of proceeding for judicial separation in cases of adultery or cruelty within three years of the marriage should have been mentioned at the beginning of Chapter III, just as the financial utility of proceedings for restitution of conjugal rights to a wife who has been deserted for less than three years might have been indicated in Chapter VI. From the theoretical point of view, the remark on p. 66 that there is 'no point in turning a decree of restitution of conjugal rights into one of judicial separation unless the petitioner wishes to stop at the latter' requires elaboration. Moreover, it is doubtful whether the reason why a

separation agreement is not a bar to a petition for restitution of conjugal rights, if it is not set up by the respondent, is that given on p. 72 to the effect that such agreements were not recognised in the Ecclesiastical Courts. In restitution cases, unlike divorce cases, ' it is to be borne in mind that the right to refuse cohabitation by reason of the existence of a separation deed is a purely personal right of the party sued, the assertion of which does not apparently serve any public interest ' (*Williams* v. *Williams*, [1921] P. 131 at p. 134).

The concluding chapters of Part I which is confined to the substantive law are lucid and accurate but, in Chapter IX, reference should have been made to the desirability of obtaining a nominal order for maintenance after divorce for a wife in circumstances that do not justify a substantial award. The case of *Reid* v. *Reid*, [1926] P. 1 should also have been cited, as illustrating a means whereby a practical difficulty which may arise, where there is a separation agreement which is not terminated by divorce, may be surmounted. The case of *Joss* v. *Joss*, [1943] P. 18 is a further omission of minor importance from this chapter.

Part II deals with the relevant High Court practice, and, although from the point of view of the student, one sometimes wonders whether the practice could not be adequately dealt with while the substantive law is being treated, Mr. Tolstoy's account should prove most helpful. It contains just the right amount of forms for the student's purposes, and attention is drawn to the following minor inaccuracies simply for consideration when a second edition which should be necessitated as much by the merits of the book as by the pace of the development of our divorce laws comes to be prepared. (i) P. 190—The marriage certificate is filed with the petition not with the application for the registrar's certificate. (ii) P. 191 (n)—An affidavit which does not contain the residential address of the solicitor's managing clerk will not be accepted by the divorce registry. (iii) P. 199 (n)—Reference should be made to *Campbell* v. *Campbell*, [1940] P. 90. (iv) Chapter XVI should contain a reference to the practice of obtaining consent orders as to maintenance on summons to the registrar. (v) P. 223—It should be made clear that an ordinary copy and not an office copy of the affidavit in support is served with an originating summons.

The book concludes with a third part on matrimonial causes before magistrates which should be of great help to the practitioner as well as to the student, because the law is set out in great detail with several stimulating suggestions.

Rupert Cross.

History of Roman Legal Science. By F. Schulz. (Oxford: Clarendon Press. 1946. xvi and 358 pp.)

This is an admirable work, explaining a leading scholar's opinions about—not Roman law, but—the way in which the Roman lawyers worked, their social position, their organisation, their aims and methods, and their literature. It is a joy to read (for which not a little praise is due to the translator, Professor De Zulueta of Oxford) and may be recommended to anyone, whether a specialist or not, interested in a fascinating chapter from the history of human thought.

The author possesses a vast knowledge of the relevant material, legal or lay, and is full of ideas by which it may be brought to life. To mention a few, he distinguishes between 'cautelary' and 'judicial' pronouncements of the priests of ancient Rome, *i.e.*, between sacerdotal advice on action to be taken and sacerdotal verdicts on the legality of an act performed (pp. 16 ff.). The early jurists were averse to legislation, and neither they nor the classics stated reasons when deciding a case. Both features are here connected with the aristocratic origins of the jurists: they disliked committing themselves in advance, and a decision was accepted because of the authority of him who gave it. Moreover, a student attached himself not to a University but to a great practising jurist; he thus became familiar with practice rather than general, academic concepts (pp. 24, 56 ff., 60 ff., 124). One of the reasons, the author suggests, why classical literature came to an end with the large commentaries of Ulpian was that the writing of monographs had not been cultivated (p. 257). We are warned not to underrate post-classical law: only in the Dominate, a bureaucratic system, most original work was done by the anonymous authors of imperial rescripts, instead of by jurists giving private advice or writing books (p. 264). All these points, and many others, are illuminating.

In examining the transmission of classical Roman works, the author is frequently guilty of over-subtle and over-critical argument. Here is a major example. He claims that Sabinus's *Ius Civile* was devoted to prætorian law as much as to civil; the term *ius civile*, he asserts, then meant 'private law' as opposed to 'public law'. As is well known, however, *pignus*, *depositum* and *commodatum* are among the topics which apparently did not occur in the *Ius Civile*. The explanation of this gap, according to Schulz, is not that these institutions were still prætorian (that, he urges, did not exclude them) but that the *Ius Civile* was

mere imperfect lecture-notes, published after Sabinus's death. If this were all, one might regard the thesis as arguable though unlikely. But when we come to real contract in Gaius's *Institutes*, we again look in vain for *pignus*, *depositum* and *commodatum*; and Schulz assumes that Gaius's *Institutes*, too, were imperfect lecture-notes published posthumously (pp. 72, 156 ff., 260). By now the limits of the arguable have been over-stepped. The same three topics, we are asked to believe, were omitted as a result of careless, posthumous editing in both cases, that of Sabinus and that of Gaius! And what about Mucius, the Republican jurist, whose *Ius Civile* also seems to have been silent on *pignus*, *depositum* and *commodatum*? Did he also write lecture-notes only, did they also appear after his death, and was it again just these institutions which dropped out? The conventional, less subtle explanation of all this is preferable. Of Gaius at least it is certain—and Schulz admits it (p. 159)—that he considered prætorian law only in so far as it affected civil. Therefore, of him at least, it is fairly safe to say that he disregarded *pignus*, *depositum* and *commodatum* because, though civil by his time, they had not been civil when his sources were composed. This strongly suggests that the absence of these matters from Sabinus—and Mucius—is due to the simple fact that, in the late Republic and early Principate, they did not yet belong to the civil law. Which conclusion, in turn, takes us back to the orthodox view that those jurists, by *ius civile*, did mean 'civil law' as distinct from 'prætorian law'.

Of course, the real motive inducing Schulz to propound a thesis like the one outlined, which starts from an unattested meaning of *ius civile* and leads up to a series of uncanny coincidences, is the dogma that all classics were always precise: none of them, that is, could have brought out a work as full of inexactitudes as Gaius's *Institutes*. For some sound remarks on this question, readers may be referred to Buckland, *Juridical Review*, 1936, pp. 339 ff. Here a more general point may be made. It is interesting to note that much the same state of mind may be produced by lack of criticism and by an excess of it. The authors of former centuries who treated all Roman law as one whole, without distinguishing between the strands of different times, resorted to the most artificial solutions in order to reconcile conflicting texts. The German name for their methods is *Pandektenharmonistik*. In the past twenty years a kind of creed has arisen among the very 'advanced' critics, to which the evidence is made to conform; and one is struck by the

essential similarity of the methods used to those of the pre-critical period. Future historians of Roman legal studies of the twentieth century may well be tempted to speak of *Interpolationenharmonistik*.

DAVID DAUBE.

THE PALESTINE INCOME TAX ORDINANCE. Edited by G. EICHELGRÜN. (Haifa: Paltax Publishers. London: Sweet & Maxwell, Ltd. 1945. 50 pp. 10s. net.)

THE PALESTINE INCOME TAX GUIDE. By G. EICHELGRÜN. (Haifa: Paltax Publishers. London: Sweet & Maxwell, Ltd. 1945. xviii and 235 pp. £P.3 10s.)

INCOME tax in Palestine is imposed only upon such profits as accrue in, are derived from or are received in Palestine; unlike the British tax code, liability to tax does not depend on residence. Mr. Eichelgrün points out that Palestine income tax practice has come—apparently as a result of Court decisions there—to mean British tax practice suitably adapted to local circumstances and laws. In his work he has, accordingly, quoted at length from the tax decisions of our Courts and also from leading English text-book writers, to whose opinions he seems, perhaps, to attach rather overmuch 'authority'. In an endeavour to make a dry subject interesting, Mr. Eichelgrün has interwoven into his exposition of the Ordinance not only law but also history, economics and commerce; what the work gains thereby in readability, it somewhat loses in lucidity.

Since many professional men in Palestine use English text-books, the author in his edition of the Ordinance (p. 4) has compared its relevant sections with their prototypes in the British Income Tax Acts, thereby enabling references in the text-books to be readily adapted to the Ordinance. The Guide, which is well documented and indexed, can be recommended to anyone concerned with Palestine income tax.

A. FARNSWORTH.

UNITED NATIONS AGREEMENTS. Edited by M. B. SCHNAPPER. Foreword by ARTHUR SWEETSER. (Washington: American Council on Public Affairs. 1944. 376 pp.)

A COLLECTION of the texts of agreements between all or some of the United Nations, arranged (a) by subject-matters, (b) by the countries concerned, (c) by the governmental or international agencies concerned. Not surprisingly, some of the agreements listed, such as the agreement between Poland and Czechoslovakia, are already out of date.

The Justice of the Peace Today and Tomorrow. By A Sub-committee of the Haldane Society. (London: Victor Gollancz, Ltd. 1946. 31 pp. 6d.)

In this useful pamphlet the Haldane Society set out their views as to the reform of the system of lay justices. The society consists of socialist lawyers, and it is interesting to note that they accept the system of lay magistrates as good in itself, and preferable to one of paid stipendiaries. Indeed they reject the proposals of the Conservative Party Committee for the establishment of paid chairmen largely on the ground that it would probably destroy the independence of the lay element.

The Society considers that reform is to be found in three main directions. Firstly, by democratising the Lord Lieutenants' Advisory Committee; secondly, by insisting that newly appointed magistrates should go through some course of training; and thirdly, by putting into force the proposals of the Roche Committee on Magistrates Clerks (see M.L.R., Vol. VIII, p. 1).

The main defect of this report is that the authors seem so little aware of the recent literature on this subject.

C.

Powers and Duties Attributed to the League of Nations by International Treaties. (Geneva: League of Nations. Obtainable from Allen & Unwin, Ltd. 1944. 2s. 6d. net.)

A systematic arrangement, under twenty heads, of the different functions entrusted, in International Treaties, Conventions, etc., to the League of Nations. Mainly of historical interest, but also useful as material for future international authorities. The range of functions listed is wide, but the powers of the League limited.

Arbeid; Sociaal Maandblad. First Year, No. 1, N. Samson N. V. (Alphen aan den Rijn, Netherlands.)

These two new Dutch periodicals are devoted to labour law, labour market problems, social insurance and other labour problems. *Arbeid* gives a monthly survey of practical issues, while the bias of the *Sociaal Maandblad* is more on the side of theoretical and scientific research. The first numbers are of great interest in that they show that the high standard of Dutch legal learning and analysis in the field of industrial law has survived the occupation. Both theory and practice are very much alive, and important new developments, especially in social insurance, can be expected in the near future.

O. K.-F.

BIBL. LC...

Vol. 9. No. 1 APRIL 1946

THE MODERN LAW REVIEW

STIPENDIARY MAGISTRATES AND LAY JUSTICES By R. M. Jackson 1

REFRESHER EDUCATION FOR LAWYER VETERANS By Sidney Post Simpson 13

LAW-MAKING IN WHITEHALL By Lord Chorley 26

SOME ASPECTS OF THE LAW OF LANDLORD AND TENANT By B. Plummer 42

THE NAPOLEONIC SYSTEM OF ADMINISTRATION IN FRANCE By Alfred Cobban 52

STATUTES AND REPORTS 58
Legal Aid to the Poor and the Rushcliffe Report
International Cartels

NOTES OF CASES 72
R. v. Jarmain
Churchman v. Churchman
Emmanuel v. Emmanuel
Schering, Ltd. v. Stockholms Enskilda Bank
Canadian Eagle Oil Co., Ltd. v. R.
Selection Trust, Ltd. v. Devitt

REVIEWS 88
Ebenstein: The Pure Theory of Law
Egerton: Legal Aid
Seuffert: Matrimonial Causes
Citizens' Advice Notes
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Palmer: Private Companies

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